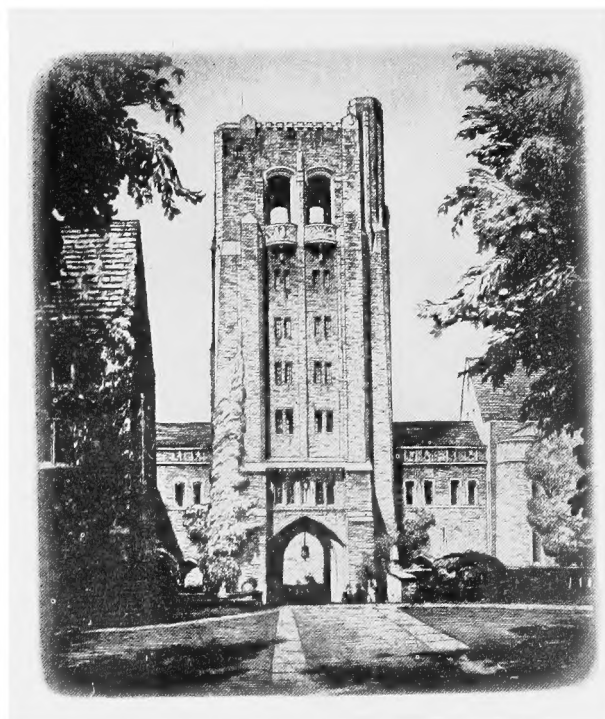


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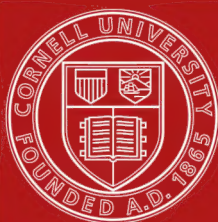
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CASES ON TRUSTS.

CHAPTER I.

VOLUNTARY TRUSTS.

ANONYMOUS.

—, 1533.

[*Reported in Brooke's Abridgment, Feoffments al Uses, pl. 54, March's Translation, 95.*]

A MAN cannot sell land to I. S. to the use of the vendor, nor let land to him rendring rent, *habend.* to the use of the lessor, for this is contrary to law and reason, for he hath recompence for it: and by HALES, a man cannot change a use by a covenant which is executed before, as to covenant to bee seised to the use of W. S. because that W. S. is his cosin; or because that W. S. before gave to him twenty pound, except the twenty pound was given to have the same land. But otherwise of a consideration, present or future, for the same purpose, as for one hundred pounds paid for the land *tempore conventionis*, or to bee paid at a future day, or for to marry his daughter, or the like.¹

DOCTOR AND STUDENT, CHAPTER 22, DIALOGUE II.

1519 (?).

Doct. May not a Use be assigned to a Stranger as well as to be reserved to the Feoffor, if the Feoffor so appointed it upon his Feoffment?

¹ Ward v. Lambert, Cro. El. 394; 2 Roll. Abr. 783 (H.), pl. 7; 22 Vin. Abr. Uses (H.), pl. 7, s. c.; Osborn v. Bradshaw, Cro. Jac. 127; Crossing v. Scudamore, 1 Vent. 137, *accord.*

“In a special verdict in agreement, the only point was, whether a lease for a year, made upon no other consideration than the reservation of a pepper-corn, shall operate as a bargain and sale, and make the lessee capable to take a release? *Et per Curiam*, it shall, for the reservation of a pepper-corn is a sufficient consideration to raise an use.” 3 Salk. 387; 2 Vent. 35; 2 Mod. 249, s. c. — *Ed.*

Stud. Yes, as well, and in like wise to the Feoffee, and that upon a free Gift, without any Bargain or Recompence, if the Feoffor so will.

Doct. What if no Feoffment be made, but that a Man grant to his Feoffee, that from henceforth he shall stand seised to his own use? Is not that Use changed, though there be no Recompence?

Stud. I think yes, for there was an Use *in esse* before the Gift, which he might as lawfully give away, as he might the Land if he had it in possession.¹

Doct. And what if a Man being seised of Land in Fee, grant to another of his mere motion without Bargain or Recompence, that he from thenceforth shall be seised to the Use of the other; is not that Grant good?

Stud. I suppose that it is not good; for, as I take the Law, a Man cannot commence an Use but by Livery of Seisin, or upon a Bargain, as [or?] some other Recompence.

NOTE.

[Reported in 1 Anderson, 37, *placitum* 95.²]

NOTE by all the justices, that if one without any consideration enfeoffs another by deed to have and to hold the land to the feoffee and his heirs to his own use, [and] the feoffee suffers the feoffor to occupy the land for divers years, still the right is in the feoffee because there is an express use contained in the deed, which is enough without other consideration; the law is the same when the feoffment is to the use of a stranger and his heirs.³

¹ "I say there is no doubt but that if I sell you my use, the use is changed from my person to you: so I understand that if I say to you, 'I give you my use in certain lands,' you have the use by such words; for the use does not pass as the land does; for land cannot pass except by livery, but a use passes by bare words." Per *York*, Y. B. 27 H. VIII. fol. 8, pl. 22. — ED.

² 22 Vin. Abr. Uses (G. 4), pl. 4, s. c. — ED.

³ *Calthrop's Case*, Moore, 101, pl. 247; *Stephenson v. Layton*, Owen, 40; 1 Leon. 138, pl. 188, s. c.; *Mildmay's Case*, 1 Rep. 176 b; *Lloyd v. Spillet*, Barnard. 384, 387, *accord*.

"When the estate was by legal conveyance transferred to a person to uses, equity made no scruple in enforcing the trustee to observe the uses. The estate being actually divested out of the owner, it was not necessary to exercise the power of the court over him, and as the feoffee, &c., was a mere trustee, he was considered bound under all circumstances to observe the will of his donor, although the uses were unsupported by any consideration. Therefore a feoffment to A. to the use of B., a mere friend of the feoffor's, who paid no consideration whatever for the estate, was binding, and A. was compellable to permit B. to receive the profits.

“It did not, however, always happen, that the estate was legally transferred to any person, to the intended uses. Upon a sale it was usual for the owner, in the first instance, to agree to sell the estate to the purchaser. This, which was a real contract, was termed a bargain and sale; and equity, although there was no conveyance, and even no words of inheritance in the contract, converted the seller himself into a trustee, and considered him to stand seised to the use of the purchaser in fee. In some instances it happened that a man in consideration of marriage, or of his regard to his near kindred, agreed to settle his estate upon them. This was termed a covenant to stand seised, and in this case also equity interposed and considered the covenantor to be a trustee for the persons in whose favor he had agreed to settle the estate. But equity, who followed most of the rules of the civil law, refused to interfere in favor of an imperfect conveyance where the agreement was a mere *nudum pactum*. If, therefore, a man had agreed without consideration to convey an estate to a stranger, equity would not have supported the bargain and sale; nor did they run wild as to covenants to stand seised, for they would not uphold a covenant to settle an estate on a distant relation. In process of time it became a settled rule, that to support a bargain and sale, money, rent, or services incident to tenure, were essential; to uphold a covenant to stand seised, the consideration must have been marriage, or natural love and affection to a legitimate child, brother, nephew, or cousin.

“These equitable notions introduced in later times a division of conveyances into those operating by transmutation of possession, and those not having that operation. The first were feoffments, fines, recoveries, and leases and releases, which actually transferred the estate at law to the nominee, and therefore operated by transmutation of possession. The others were bargains and sales, and covenants to stand seised, which did not divest the party of his estate; but merely, in equity, made him a trustee for the person to whom he had sold the estate, or on whom he had agreed to settle it.” Sugden, *Introductio to Gilbert's Uses and Trusts*, pp. xlv–xlvi. — Ed.

FRAMPTON *v.* GERRARD.

IN THE QUEEN'S BENCH, MICHAELMAS TERM, 1601.

[Reported in 2 Rolle's Abridgment, 785 (K.), *placitum* 4; 791, *placitum* 1.]

PER CURIAM. If a man covenant in consideration of blood and of the marriage of his bastard daughter to stand seised to the use of the bastard daughter, this is no consideration to raise a use, because in law she is not his daughter but *filia populi*.¹

If a man levies a fine of certain land, and covenants by indenture in consideration of blood and the marriage of his bastard daughter that the conusee shall stand seised to the use of the daughter, although this is not a good consideration to raise a use by way of covenant, still it is sufficient upon a fine, for the will of the party is sufficient for this without consideration.

WARD *v.* TUDDINGHAM.

IN THE KING'S BENCH, TRINITY TERM, 1605.

[Reported in 2 Rolle's Abridgment, 783 (H.), *placita* 5, 6.]

CONSIDERATION of ancient acquaintance, or of being chamber-fellows, or entire friends, will not raise a use.

So consideration of great familiarity or long acquaintance with him, or that they were scholars together in their youth, will not raise a use. Plow. Com. Sherington, 303.

SAME'S CASE.

IN THE EXCHEQUER, TRINITY TERM, 1609.

[Reported in 2 Rolle's Abridgment, 791, *placitum* 2.]

IF A. in consideration of £100 by B. makes a feoffment in fee to B. to the use of B. and C., the son of B., this shall raise the use to C. well enough, although all the consideration was given by B.

¹ Perrot's Case, 2 Roll. Abr. 785 (K.), pl. 5 *accord.* — ED.

ANONYMOUS.

[Reported in 2 Rolle's Abridgment, 78 (I.), placita 5, 6, 7.]

If a man in consideration that B. will marry his daughter covenants to stand seised to the use of B. and his daughter, remainder to C., this is a void remainder to C., for he is a stranger to the consideration.¹

In consideration of certain money given by B. a man may covenant to stand seised to the use of A. for life, remainder to C. in fee; for here it is apparent that the money was given for both estates; and although A. and C. are strangers to the giving of the money, still they are sufficiently privy since it was given for them.

So in consideration of certain moneys given by B., a man may covenant to stand seised to the use of B. for life, remainder to C. in fee, or with divers mesne remainders, for the money was given for all the estates. Cit. Plow. 307 b.

¹ Paget's Case, 1 Rep. 154; Moo. 193, pl. 343; 1 Leon. 194, pl. 279, s. c.; Wiseman v. Barnard, 2 Rep. 15; Moo. 195, pl. 344; And. 140, pl. 191, s. c.; Fox v. Wilcocks, 2 Roll. Abr. 733 (H.), pl. 4; Smithy v. Risley, Cro. Car. 529; Jones, 418, pl. 6, s. c.; Bulkley's Case, Ley, 57, 58; Whaley v. Tankard, 2 Lev. 52, 54; Nugent v. Hancock, 22 Vin. Abr. Uses (H.), pl. 13, accord.

Cestui que use is a stranger, unless (1) nearly related by blood to the covenantor, *e. g.*, a son or grandson (Bonde v. Edmonds, 2 Roll. Abr. 782, Uses (H.), pl. 8; 2 Roll. Abr. 785, Uses (K.), pl. 6, 8); a daughter (2 Roll. Abr. 784, Uses (I.), pl. 2); a brother (Sherington v. Strotton, Plow. 307); a nephew (Englefield's Case, 7 Rep. 11 b), and the like; or unless (2) connected by marriage with the covenantor, *e. g.* wife of covenantor (Bedell's Case, 7 Rep. 40; Burgoine v. Burgoine, 22 Vin. Abr. Uses (N.), pl. 10; Co. Lit. 112 a); husband of covenantor's daughter (2 Roll. Abr. 784, Uses (I.), pl. 2); wife of covenantor's son (Anon., 13 Rep. 48; Sheffield's Case, 13 Rep. 49; Corbyn v. Corbyn, 2 Roll. Abr. 784, Uses (I.), pl. 4; Bould v. Winston, Cro. Jac. 168; Noy, 125, s. c.); wife of covenantor's brother (2 Roll. Abr. 783, Uses (I.), pl. 1), and the like.

The *cestui que use* need not be the covenantee. Bedell's Case, *supra*; Harpur's Case, 11 Rep. 24 b; Buckler v. Symons, 2 Roll. Abr. 788, Uses; Winch, 61, s. c. In Co. Litt., *supra*, the learned commentator says: "A man may by his deed covenant with others to stand seised to the use of his wife. . . . But a man cannot covenant with his wife to stand seised to her use; because he cannot covenant with her, for the reason that Littleton here yieldeth (*viz.* that 'his wife and he are but one person in the law')." See to the same effect Gilb. Trusts, 52, 54. — Ed.

SLANNING AND OTHERS v. STYLE AND *e Contra*.

IN CHANCERY, BEFORE LORD TALBOT, C., MICHAELMAS TERM, 1784.

[Reported in 3 Peere Williams, 334.]

THREE sisters and their husbands, claiming as residuary legatees under the will of Robert Style, brought their bill against his widow for divers goods of the testator detained by her, which were not given her by the said will; and the widow preferred her bill for goods detained by the executors, and which (as was alleged) she was entitled to by the will.¹

Another thing insisted upon on behalf of the defendant, the widow, was that the testator allowed his first wife to dispose and make profit of all such butter, eggs, poultry, pigs, fruit, and other trivial matters arising from the said farm (over and besides what was used in the family), for her own separate use, calling it her "pin-money;" and upon the death of the first wife, and until the testator married the defendant, Style, the testator's sister, the defendant, Pelling, kept his house, and had the same allowance, which was also continued to the defendant, the widow, after her marriage, by way of "pin-money;" and it was proved in the cause that her husband, whenever any person came to buy any fowls, pigs, &c., would say he had nothing to do with those things, which were his wife's; and that he also confessed, that, having been making a purchase of about £1,000 value, and wanting some money, he had been obliged to borrow about £100 of his wife to make up the purchase-money; therefore now the widow claimed to be paid this £100.

To which it was answered, that here was no deed touching this agreement, nor any writing whatsoever, whereby to raise a separate property in a *feme covert*, which was what the law did not favor; that it was no more than a connivance, or permission, that the wife should take these things, and continue to enjoy them during his (the husband's) pleasure, which pleasure was determined by his death; besides, this agreement, being after marriage, was but a voluntary one, for which a court of equity usually leaves the party to take his remedy at law; and that, in truth, the husband's borrowing this £100 of his wife was no more than borrowing his own money.

But the Lord Chancellor decreed that the widow, the defendant, was well entitled to come in for this £100 as a creditor before the Master, observing that the courts of equity have taken notice of and allowed *feme coverts* to have separate interests by their husbands' agreement; and this £100 being the wife's savings, and here being evidence that the husband agreed thereto, it seemed but a reasonable encouragement to the wife's frugality, and such agreement would be of little avail

¹ A portion of the case, not relating to the law of trusts, has been omitted. — ED

were it to determine by the husband's death ; that it was the strongest proof of the husband's consent, that the wife should have a separate property in the money arising by these savings, in that he had applied to her and prevailed with her to lend him this sum ; in which case he did not lay claim to it as his own, but submitted to borrow it as her money.

Wherefore, and especially as here was no creditor of the husband to contend with, it was ordered that the wife should be allowed to come in for this £100 as a creditor before the Master ; and the court cited the case of *Calmady v. Calmady*, where there was the like agreement made betwixt the husband and wife, that upon every renewal of a lease by the husband two guineas should be paid by the tenant to the wife, and this was allowed to be her separate money.¹

BEARD v. BEARD.

IN CHANCERY, BEFORE LORD HARDWICKE, C., APRIL 5, 1744.

[*Reported in 3 Atkyns, 72.*]

THE plaintiff's husband, a freeman of London, being at variance with his wife, in January, 1739, by his will, executed at a tavern, gives all his estate, real and personal, to his brother, and makes him his executor.

In November, 1740, by a deed-poll, he gives and grants unto his wife all his substance which he now has or may hereafter have.

The bill was brought by the wife, who insists upon the deed-poll, and that the will was revoked by this subsequent act of the husband in his lifetime.

The counsel for the plaintiff cited *Boughton v. Boughton*, the 5th of December, 1739,¹ and *Harvey v. Harvey*, November the 12th, 1739.²

LORD CHANCELLOR. A man here has done two very unreasonable acts ; if it should happen one trips up the heels of the other, it is a very fortunate thing to set everything right again.

A wife appears here to be unprovided for, both before and after marriage.

A will is made at a tavern, probably in a passion, for the husband was parted from his wife at that time, by which he gives his whole estate to his brother.

¹ *Ward v. Bowyer*, Finch, 56 ; *Manzey v. Hungerford*, 2 Eq. Abr. (3d ed.) 155 ; *Ashworth v. Outram*, 5 Ch. D. 923 ; *Oglesby v. Hall*, 30 Ga. 386 ; *Kee v. Vasser*, 2 Ired. Eq. 553 ; *Wood v. Warden*, 20 Ohio St. 518 ; *Pinney v. Fellows*, 15 Vt. 525 (*semble*), *accord.* See *Stimson v. White*, 20 Wis. 562. — Ed.

² 1 T. Atk. 625.

³ *Vide* 1 T. Atk. 561.

Afterwards he is guilty of another unreasonable act, — a gift to his wife, by deed-poll, of all his substance.

The question is, Which is to take effect?

The latter cannot take effect as a grant or deed of gift to the wife, because the law will not permit a man to make a grant or conveyance to the wife in his lifetime, neither will this court suffer the wife to have the whole of the husband's estate while he is living, for it is not in the nature of a provision, which is all the wife is entitled to.¹

He declared, likewise, that the will was revoked² as to all the personal estate by the deed-poll, and yet it cannot take effect as a gift or grant of such personal estate to the plaintiff, but the said personal estate must be distributed.

GRAHAM v. LONDONDERRY.

IN CHANCERY, BEFORE LORD HARDWICKE, C., NOVEMBER 24, 1746.

[*Reported in 3 Atkyns, 393.*]

THERE was a question in the cause between Mr. Graham and Lord Londonderry, whether Lady Londonderry, now the wife of the plaintiff, but originally the wife of the late Lord Londonderry, was entitled in her own right, or as paraphernalia, to particular jewels hereafter mentioned.

First, as to diamonds given her by Governor Pitt, her husband's father, and which were a present to her on the marriage with his son.

LORD CHANCELLOR. This court, of latter years, have considered such a present as a gift to the separate use of the wife; and I am of opinion she is entitled in her own right.

The next question was as to four diamonds set about the picture of the late regent of France.

Lord Londonderry returned from France, and delivered this picture to Lady Londonderry, and said at the same time it was a present sent her by the regent of France.

If this be considered as a present from the regent of France, it falls under the same rule; for, being a present from a stranger, during the coverture, must be construed as a gift to her separate use, though I do not think it so clear a case as the other.

There have been several cases.

Mrs. Hungerford's case, which was money appropriated for her separate use, and decreed to her.

¹ Coakes v. Gerlach, 44 Pa. 43, *accord*. — Ed.

² So much of the opinion as relates to the question of revocation is omitted. — Ed.

Another case of the late Countess Cowper, before Sir Joseph Jekyll, several trinkets were given her by Lord Cowper, in his lifetime, and determined to be her separate estate.¹

Two cases in my time: The first was *Lucas v. Lucas*, July 2, 1738. There were two questions: one in respect of £1,000 South Sea annuities, which the husband had transferred in the name of his wife; the other as to jewels, &c., given by the plaintiff's wife's father to the wife.

I was of opinion she was entitled both to the South Sea annuities and the jewels, because I considered them as given to her separate use.

The second case was heard upon the 19th November, 1740, *Brinkman v. Brinkman*.

Certain pieces of plate were given to the wife, immediately after the marriage, by the husband's father; I was of opinion they were to be considered as gifts to the wife for her separate use.

Next, as to the diamond necklace that underwent several alterations, but must be confined to such diamonds as were in it at the time of Lord Londonderry's death.

This is not to be considered as a gift merely to the separate use of the wife.

I have indeed admitted a husband may make such gifts, but where he expressly gives anything to a wife, to be worn as ornaments of her person only, they are to be considered merely as paraphernalia, and it would be of bad consequence to consider them as otherwise; for if they were looked upon as a gift to her separate use, she might dispose of them absolutely, which would be contrary to his intention.

But this will be the same thing as to Lady Londonderry's interest, if it can be proved she wore them as the ornaments of her person.

It is not necessary to prove she wore them at all times, but only upon birthdays and other public occasions, which it has been proved she did.

I am therefore of opinion she is entitled, unless the objection should prevail, of the alienation by the husband in his lifetime.

For whatever jewels a wife wears for the ornament of her person, the husband may alien in his lifetime.

But I am of opinion the act Lord Londonderry did amounted not to an alienation.

The diamond necklace was pledged as a collateral security for £1,000 borrowed by Lord Londonderry of Mr. Middleton, and a bond given at the same time, which shows it was intended as a personal security from himself; a power, likewise, was given to Mr. Middleton, whilst Lord Londonderry was out of England, to sell the necklace for £1,500.

¹ *Gore v. Knight*, 2 Vern. 535, n. (1), *contra*. — ED.

This does not amount to a sale, but only a necessary power in order to reimburse Mr. Middleton, when sold, his principal and interest.

But it was not sold, and therefore, at his death, stood only as a pledge.

I am of opinion, if a husband pledges the wife's paraphernalia, and dies, leaving a sufficient estate to redeem the pledge and pay all his debts, she shall be entitled to have it redeemed out of the husband's personal estate.

The case of *Tipping v. Tipping*¹ is a much stronger case, that the right of the wife to paraphernalia is to be preferred to that of a legatee; a leading case, and has been followed by the court ever since.

Suppose Lord Londonderry had given this necklace to a legatee specifically, the legatee would have been entitled to come into this court to have it disincumbered, and the right of the wife is superior to that of any legatee; and therefore I declare she is entitled to the necklace, and as it has been sold, she is entitled to an account according to the value at which it has been sold.

COLMAN v. SARREL.

IN CHANCERY, BEFORE LORD THURLOW, C., NOVEMBER 10, 13, 16,
1789.

[*Reported in 1 Vesey, Jr., 50.*]

GEORGE DAVY, 11th June, 1767, assigned by deed to trustees £1,000 three per cent bank annuities in trust for Joan Sarrel for life, in case she should survive him; and after her death for such child or children of her, and in such proportions, as she should appoint; with a proviso, if she should live in any other place than that in which the grantor should reside, to be void, but not otherwise. The deed contained a covenant by him, that if he should survive her, he would pay the interest and dividends to such of her children, and in such proportions, as she should appoint the principal. At the time of the deed, his wife and her husband was living. The consideration expressed in the deed was for some satisfaction for the injuries the grantee had received from the wife of the grantor. No actual transfer of the stock ever took place. Joan Sarrel, having survived the grantor, appointed by will £600 of this fund to one child, and £200 each to two others. Colman, as executor of the grantor, filed a bill to have the deed delivered up, as being voluntary. The children filed a cross-bill to have the deed carried into execution by a decree upon the executor to transfer the

¹ 1 P. Wms. 730.

stock to their trustees. By the evidence of plaintiff in the original bill it appeared that the witness had gone into a room, in which he found Davy, his wife, and Mrs. Sarrel; that Mrs. Davy had her hand to her head as if she had received a blow, and complained to the witness that her husband had beaten her; that at the time of the execution of the deed Mrs. Sarrel had threatened to kill him, had pursued him through the town with a knife, and had said, she had purchased a shroud for him. In 1770, he applied for a *supplicavit* against her, and she was bound accordingly. He resisted this deed in his life, when threatened with a suit upon it.

Mr. Mansfield and *Mr. Grimwood*, for the plaintiffs in the cross-bill.¹ It is not a mere voluntary agreement, but a voluntary gift of stock, not to take place till after his death; and therefore they are in the same situation as legatees of stock. The consequence is, that his executors at his death become trustees under this voluntary gift for the persons to whom it is given; as they would have been, if he had given it by his will. Then there is a covenant in the deed which creates a debt; and the party comes to be paid out of the assets as for any other debt. Either an action of debt or covenant would lie; but they come into this court in the common way. It is not a case for making perfect a defective voluntary agreement; but here is a deed under seal conveying to trustees. It is an equitable gift instead of a legal one.

LORD CHANCELLOR. If you have it at law, there is an end; if not, the question is, whether you can have a voluntary agreement executed in equity. The difficulty is to show a case where any voluntary gift has been executed in equity. You are now upon a question whether a court of equity will set up a deed you cannot proceed upon at law.

For plaintiffs. *Villars v. Beaumont*; ² *Boughton v. Boughton*; ³ *Lechmere v. Earl of Carlisle*.⁴ Besides, in the present deed there is a covenant. In *Williamson v. Codrington*,⁵ Lord Hardwicke retained the bill, and would not drive the party to a remedy at law. The single question is, whether a voluntary assignment by deed of stock is not sufficient to pass that stock as against volunteers; or, in other words, whether a man may not, reserving, as he intended to do, the stock and receiving the dividends during his life, make a final gift of it to take place after his death, by deed as well as by will; so as to lay an obligation upon his executors, as if he left it as a legacy. The stock was transferred as far as it could be by deed. They come as to the transfer upon the effect of a deed completely executed, asking nothing more. There are many dicta in the books, but no cases exactly like this. They are only

¹ Lord Thurlow dismissed the original bill. The arguments and opinion relating thereto are omitted. — Ed.

² 1 Vern. 100.

³ 1 Atk. 625; 1 Vern. 365

⁴ 3 P. Wms. 222.

⁵ 1 Ves. 514.

where the court has been called upon to aid defective conveyances, by which a volunteer claims against an heir-at-law; and there the person claiming against the heir must produce a conveyance by a proper instrument; which, if he cannot do, the heir's right attaches; of which he shall not be deprived by a defective attempt of his ancestor. The only case is 1 P. Wms. 60,¹ where a voluntary settlement was allowed to raise a trust upon consideration of blood between two half-brothers; and the authority of that case has been questioned; for, to be sure, it was a bad reason. There are dicta in the abridgments which the original cases frequently do not support; which all resolve into the right of the heir-at-law. There is no rule preventing this disposition of stock in equity by deed. It is a disposition of a chose in action. It is true it is not exactly like other choses in action; because there is a mode by which, to most purposes, the legal interest may be transferred, namely, the common mode at the bank; but it is in truth a chose in action; and there can be no doubt that a voluntary assignment of a chose in action, though to take place after a man's death, is good in equity to make the executor after the death of the assignor a trustee for his assignee. There is no rule or principle preventing such a disposition as this from operating exactly in the same manner as a legacy by will. It must imply the same obligation upon the executor as a will to transfer the equitable interest after his death. Though freehold cannot be conveyed *in futuro*, stock and choses in action may. There is no express covenant in the deed that the executors shall transfer, though certainly the sense is tantamount to that; if there were, there are cases to be found in which voluntary covenants have been executed here, as that in Vesey, in which Lord Hardwicke went much at large into the reasons. The argument against it was upon the nature of the covenant being voluntary. It was strictly not so clear as this; for it was a general covenant obliging himself, his heirs, executors, and administrators, to warrant the plantation, negroes, cattle, &c., upon which no action of debt would lie. Here, I think, it would; for wherever there is a covenant to pay a sum certain, or which can be reduced to certainty, action of debt will lie. Here, as she directed the shares, it is matter of calculation; for the covenant is to pay according to such shares as she shall direct. The case in Vesey has gone a great way farther, for there nothing could be recovered but damages. These children are entitled out of the assets. The reason of those cases giving effect to voluntary covenants would, if he had said in terms, "I covenant that my executors shall transfer," &c., have bound the stock; and her appointees would have a right to come here upon the ground of this interest; for if upon a general covenant to warrant, which gives a mere right to sue for damages, Lord Hardwicke at once gave relief in equity, there

¹ Watts v. Bullas. See the notes in the 4th edition.

is no doubt that he would not have sent it to law in such a covenant, as I suppose. If that would be the effect of such a covenant, though this deed contains no words precisely amounting to it, yet in equity that effect can be produced.

Solicitor-General and *Mr. Cooke*, for defendants in the cross-bill. Probate of her will in the Ecclesiastical Court is not sufficient: it ought also to have been proved in this court.

LORD CHANCELLOR. The proof in the Ecclesiastical Court is sufficient, as far as it goes; if there is anything particular in it, the ulterior proof may be proceeded upon in this court.

For defendants. The only case for it is that in *P. Wms.* and in *Goring v. Nash*,¹ Lord Hardwicke expressly denies that to be law.

LORD CHANCELLOR. If you can bring an action, you may. The covenant seems to be but in aid of the form of the transfer. The only case coming near it is that in *Vesey*, but it is not so clear a case that a court of equity will take it out of the hands of a jury. Where a deed is not sufficient in truth to pass the estate out of the hands of the conveyer, but the party must come into equity, the court has never yet executed a voluntary agreement. To do so would be to make him who does not sufficiently convey, and his executors after his death, trustees for the person to whom he has so defectively conveyed; and there is no case where a court of equity has ever done that. Whenever you come into equity to raise an interest by way of trust, you must have a valuable, or at least a meritorious, consideration. Nothing less will do.²

For plaintiffs in cross-bill. One of the executors who disputes this deed is himself a subscribing witness.

LORD CHANCELLOR. Perhaps he was called in to execute it without knowing the contents; that is the best excuse he can make.

Upon application for costs to the trustee in the deed:

LORD CHANCELLOR. I shall not give him his costs. Let those who manufactured the deed give them to him. It is impossible for me to give costs in such a case as this. Every one who hears this case, though it does not amount to duress, knows that it is not meritorious. Even if you recovered upon this deed, I would not give costs to any one claiming under a contract, such as it is.³

Upon application to have some provision made as to the costs of the action:

LORD CHANCELLOR. If the trustee or representatives are insolvent, they must give security for the costs of the action.

The decree was, "that the original bill should be dismissed without

¹ 3 Atk. 189.

² 1 Fonb. Treat. Eq. 41; *Ellison v. Ellison*, 6 Ves. 656.

³ The trustee's costs were afterwards refused, on petition. 2 Cox, 206.

costs; that the cross-bill should be retained twelve months, during which time the plaintiffs in it should be at liberty to bring an action upon giving security, to be approved by a master, to answer the costs of it; on non-compliance with these terms, the bill at the end of the year to stand dismissed with costs."

The plaintiffs in the cross-bill did nothing till the 1st November, 1790, when they applied to have the time for bringing the action enlarged for six months; which the Lord Chancellor thought reasonable, and ordered. Upon that order they commenced the action without giving security for the costs. Upon the 11th, Mr. Mitford moved to amend the minutes of the last order by inserting the terms contained in the decree; and the Lord Chancellor granted the motion, declaring he meant not to discharge the terms when he enlarged the time.¹

SLOANE v. CADOGAN.

IN CHANCERY, BEFORE SIR WILLIAM GRANT, M. R., DECEMBER, 1803.

[*Reported in Sugden, 3 Vendors and Purchasers (10th Ed.), Appendix, 66.*]

UNDER a settlement made previously to the marriage of Earl Cadogan and Frances his wife, the sum of £20,000 was assigned to trustees upon certain trusts, under which William Bromley Cadogan, one of the children of the marriage, became entitled, subject to his father, Lord Cadogan's, life-interest therein, to one-fourth share of the £20,000, which sum was afterwards invested in the three per cent reduced annui-

¹ *Ellison v. Ellison*, 6 Ves. 656 (*semble*); *Pulvertoft v. Pulvertoft*, 18 Ves. 89, *accord*.

In *Ellison v. Ellison*, *supra*, Lord Eldon said: "I had no doubt, that from the moment of executing the first deed, supposing it not to have been for a wife and children, but for pure volunteers, those volunteers might have filed a bill in equity on the ground of their interests in that instrument; making the trustees and the author of the deed parties. I take the distinction to be, that if you want the assistance of the court to constitute you *cestui que trust*, and the instrument is voluntary, you cannot have that assistance for the purpose of constituting you *cestui que trust*; as upon a covenant to transfer stock, &c., if it rests in covenant, and is purely voluntary, this court will not execute that voluntary covenant: but if the party has completely transferred stock, &c., though it is voluntary, yet the legal conveyance being effectually made, the equitable interest will be enforced by this court. That distinction was clearly taken in *Colman v. Sarrel*, independent of the vicious consideration. I stated the objection that the deed was voluntary; and the Lord Chancellor went with me so far as to consider it a good objection to executing what remained in covenant. But if the actual transfer is made, that constitutes the relation between trustee and *cestui que trust*, though voluntary and without good or meritorious consideration; and it is clear in that case, that if the stock had been actually transferred, unless the transaction was affected by the turpitude of the consideration, the court would have executed it against the trustee and the author of the trust." — ED.

ties, in the trustees' names. By an indenture, bearing date the 26th May, 1798, William Bromley Cadogan assigned to William Rose, William Bulkley, Duncan Stewart, and Alexander Graham, their executors, administrators, and assigns, all such part, share, or proportion as he the said William Bromley Cadogan was entitled to as aforesaid, expectant on the decease of the Earl, his father, of and in the said sum of £20,000, and all the interest which, after the decease of the Earl, should become due in respect of such share, to hold the same immediately after the death of the said Earl, and subject to his life estate or interest therein, in the mean time, unto the said William Rose, William Bulkley, Duncan Stewart, and Alexander Graham, their executors, administrators, and assigns, upon trust, immediately after the decease of Lord Cadogan, by and out of the first moneys which should be received by or come to their hands, by virtue of the same indenture, to pay £1,000 to such person or persons, and for such uses, intents, and purposes, as he the said William Bromley Cadogan should, by any writing or writings under his hand, direct or appoint; and, in default of such direction or appointment, then to pay the said sum of £1,000 unto the said William Bromley Cadogan, or his assigns, to and for his and their own use and benefit. And upon trust, to place out or invest the residue or surplus of the said moneys and premises, as soon as might be after the same should be received by them the said trustees, in such stocks, funds, or securities as therein mentioned; and to stand possessed of all the said residue of the said trust moneys which should remain after payment of the said sum of £1,000, and of the said stocks, funds, or securities; upon trust to pay unto or authorize the said William Bromley Cadogan and his assigns to receive the interest, dividends, and annual produce for life; and after his decease, and in case his wife, the plaintiff, should be then living, upon trust to pay unto or authorize her and her assigns to receive the interest, dividends, and annual produce thereof for her life, for her and their own use and benefit, the same to be in lieu of dower; and immediately after the decease of the survivor of the said William Bromley Cadogan and plaintiff, upon trust to pay, assign, and transfer the said residuum, and the stocks, funds, or securities for the same, in such manner for the benefit of the issue of the marriage between them the said William Bromley Cadogan and plaintiff as therein mentioned; and "for default of such issue, upon trust to pay, assign, and transfer the same to such person or persons, and upon such trusts, for such uses, intents, and purposes, and by, with, under, and subject to such powers, provisos, charges, conditions, and limitations over as he the said William Bromley Cadogan, at any time or times during his life, by any deed or deeds, writing or writings, with or without power of revocation, to be sealed and delivered in the presence of and attested by two or more credible witnesses, or by his

last will and testament in writing, or any writing in the nature of or purporting to be his last will and testament, to be by him signed and published in the presence of and attested by such and the like number of witnesses, should direct, limit, or appoint; and in default of such direction or appointment, or in case of any such, and the same should not be a complete disposition thereof, then upon trust to pay, assign, and transfer the said residue, and the stocks, funds, or securities for the same, or so much thereof whereto any such direction or appointment as aforesaid should not extend, to the said Earl Cadogan (his father), his executors, administrators, and assigns, to and for his and their own use and benefit." And in the same indenture is contained a proviso empowering the said William Bromley Cadogan and his wife, the plaintiff, at any time during their joint lives, to revoke the said trusts, or any of them, and to appoint or limit new or other trusts in the manner therein mentioned. The three per cents were sold, and the produce lent to the Earl in 1786, upon real security by way of mortgage.

There was no child of the marriage between the testator and his wife. The testator did not, in his lifetime, in any manner execute his general power of appointment in the indenture of 26th May, 1783, or his power of appointment of the said sum of £1,000, unless by his will; nor did he, together with the plaintiff, execute their joint power of revocation therein contained.

The plaintiff claimed to be entitled to one-fourth part of the £20,000, and the bill was filed against the executors of the Earl of Cadogan, to establish her right.

The defendants, in their answer, claimed to be entitled to the whole of the fourth share of the said William Bromley Cadogan, subject to the plaintiff's right to the interest for her life (save and except the aforesaid £1,000 part thereof), under the indenture of 26th of May, 1783.

Mr. Richards, Mr. Stephen, Mr. Bowdler, and Mr. Sugden, for the plaintiff. The argument of the latter, which in a great measure was a repetition of the arguments before urged, is the only one of which he is enabled to give the reader a full note.

It was to the following effect:—

I mean to contend, that the supposed settlement of Mr. Cadogan was merely tantamount to articles, that the gift to the Earl was voluntary, and consequently cannot be enforced by this court, and that it is immaterial that the funds are now actually vested in the executors of the Earl. I may admit, that if we asked the court to execute the articles, they must be executed *in toto*. But we do not require the aid of the settlement to support our title; we are content to take this fund as part of Mr. Cadogan's property discharged from this settlement. To constitute an actual settlement, so as to enable a volunteer to claim the benefit of it, it is absolutely necessary that the relation of trustee and *cestui que*

trust should be established. Here Mr. C. did all he could ; but that is not enough. He could not make an actual transfer. The trustees in whom it was vested would not have been authorized in transferring it of their own authority to the trustees of Mr. C.'s settlement. If a man is seised of the legal estate, and agree to make a voluntary settlement, it cannot be enforced. Can it make any difference that the legal estate happens to be outstanding ? Certainly not. As the settlement, therefore, was not completely effected, the Earl could not enforce it. It will not be pretended that there is any consideration as between a child and father, which will call for the interference of this court. The father is as a mere stranger. It was so as to covenants to stand seised ; and this court does not even advert to every consideration which is sufficient to raise a use under a covenant to stand seised. In *Stevens v. Trueman*,¹ where an agreement by a child to settle an estate in the events which had happened on her father, was enforced, it was not even hinted that there was any consideration as between the child and father ; but the decision was grounded on the gift by the father of £500 to the child. And in all the cases on this subject, it will be found that the decisions proceeded on the ground of some consideration given for the settlement on the strangers. *Goring v. Nash*² was the mere case of a settlement by a father on his younger daughter. *Osgood v. Strode*³ was an actual purchase by the grandfather of the limitations to his grandchildren. *Vernon v. Vernon*⁴ turned upon something like a moral consideration. Lord Chancellor King did not consider it a voluntary conveyance.⁵ Besides, there the court relied upon the covenant which might be enforced at law ; and, therefore, to prevent circuity, they enforced a performance in specie. But even that doctrine is now overruled, *Hale's Case* ;⁶ and in our case there is no covenant. The general doctrine in these cases is recognized in *Colman v. Sarrel*, followed by *Ellison v. Ellison*.⁷ In this case, it is not material that the fund is actually vested in the defendants ; because it is vested in them in a different right. This court will never permit a mortgagor under a settlement to claim the fund in a different character. In *Ellison v. Ellison*, Lord Eldon considered that when the relation of trustee and *cestui que trust* was actually raised, although the settlement was voluntary, it was not material that the fund had, by the effect of accident, got back to the settlor, as if the trustee of stock should make the settlor his executor. Now, the converse of this proposition must equally hold good, and that is our case. It is like a late case before your Honor, where a legacy was given to a married woman by a will, and the husband was made executor, and received the legacy ; and your

¹ 1 Ves. 73.² 3 Atk. 186.³ 2 P. Wms. 245.⁴ 2 P. Wms. 594.⁵ 2 Kel. Cha. Ca. 10.⁶ Ch. 1764.⁷ 6 Ves. Jr. 656.

Honor held that he had not reduced it into possession, so as to prevent his wife's right by survivorship. And why? Because he had received it as executor, and not in his marital right. The characters were totally distinct. That decision must govern our case.

Sir Samuel Romilly and *Mr. Raithby*, for the defendants. As to the point of the settlement being voluntary, if it be correct, it cannot be acted upon in this case, because the plaintiff states the settlement, and grounds her title upon it. The question is not made by the bill, and cannot now be gone into, even admitting that the law is as stated; whereas, here the fund is actually assigned, and the defendants do not require the assistance of the court to defend their title.

Mr. Richards, in reply. The limitation to the Earl of Cadogan was merely voluntary; it was a mark of respect to him; but, in point of law, he was a mere stranger. He could not have required a subpoena against our trustees. And, in fact, the defendants are asking relief, as they want to retain the fund, although they are bound to re-assign it in their character of mortgagors. [MASTER OF THE ROLLS. Lord Cadogan could not have come here, requiring Mr. Cadogan to give him a better security for the money. But here, did Lord C. stand in need of any other aid? The assignment was as good an assignment as could be made of this reversionary interest. You may be trustee for a volunteer.]

MASTER OF THE ROLLS, having taken time to consider:—

Two points were made on the part of the plaintiff: 1st, that it was not necessary that the husband should execute the power; but, 2dly, if it was, that his will did amount to an execution of it.¹ As to the first, it was said that the gift to Lord Cadogan was merely voluntary, and Lord C. could not have had any assistance from this court: that the question is the same as if the representatives were parties seeking relief, as the circumstance of his executors having the money makes no difference, and I think that that circumstance is immaterial. But, as against the party himself and his representatives, a voluntary settlement is binding. The court will not interfere to give perfection to the instrument, but you may constitute one a trustee for a volunteer. Here the fund was vested in trustees. Mr. W. Cadogan had an equitable reversionary interest in that fund, and he has assigned it to certain trustees; and then the first trustees are trustees for his assigns, and they may come here, for when the trust is created no consideration is essential, and the court will execute it, though voluntary.

The bill must be dismissed as to this fund.²

¹ The Master of the Rolls held that the will did not amount to an execution of the power. So much of the case as relates to this point is omitted.—ED.

² *Villers v. Beaumont*, 1 Vern. 100; *Ellison v. Ellison*, 6 Ves. Jr. 656; *Bentley v. Mackay*, 15 Beav. 12; *Voyle v. Hughes*, 2 Sm. & G. 18; *Lambe v. Orton*, 1 Dr. & Sm. 125, accord.—ED.

PYE,
DUBOST, } *Ex parte.*

IN CHANCERY, BEFORE LORD ELDON, C., APRIL 26, 29, MAY 27,
JUNE 13, 28, 1811.

[*Reported in 18 Vesey, 140.*]

WILLIAM MOWBRAY, by his will dated the 10th of April, 1806, giving his wife the residue of his property after payment of his debts, except the sums after mentioned, among other legacies, gave as follows: "I give and bequeath the sum of £4,000 sterling to Louisa Hortensia Garos, daughter of John Louis Garos, formerly of Berwick Street, Westminster; the like sum of £4,000 to Emily Garos, her sister, and £4,000 to Julia Garos, her other sister; and in case of the death of one of the three, I desire that the legacy may be divided equally betwixt the two surviving sisters; and in case of the death of two of them, I desire the whole £12,000 may be paid to the surviving sister."

The testator also gave to John Louis Garos £600; and "to Marie Genevieve Garos, his wife, the sum of £2,500 sterling for her own use, and over which her husband is not to have any power: he having lived abroad for many years, and she in this country, and no correspondence having passed between them during that time. Her own receipt shall be a sufficient authority to my executors for paying her the above legacy."

The testator died on the 8th of June, 1809. His widow became a lunatic; the petitioner, Pye, was the committee under the commission, and, upon her death, took out administration to her, and administration *de bonis non* to the testator.

The Master's report stated that, by a letter written by the testator to Christopher Dubost, in Paris, on the 25th of November, 1807, the testator authorized him to purchase in France an annuity of £100 for the benefit of the said Marie Genevieve Garos for her life, and to draw on him for £1,500 on account of such purchase; and under that authority Dubost purchased an annuity of that value; but that, as she was married at the time, and also deranged, the annuity was purchased in the name of the testator; and the testator sent to Dubost, by his desire, a power of attorney, authorizing him to transfer to Marie Genevieve Garos the said annuity, dated the 10th of June, 1808.

The report further found, upon the affidavit of Dubost and the copy of the deed, that the first intimation he received of the death of the testator, who died in June, 1809, was in November, 1809; and that,

in ignorance of such death, Dubost, on the 21st of October, 1809, exercised the power vested in him, by executing to Marie Genevieve Garos, her late husband being then dead, and she of sound mind, a deed of gift of the said annuity; and the Master found that, by the law of France, if an attorney be ignorant of the death of the party who has given the power of attorney, whatever he has done while ignorant of such death, is valid. The Master, therefore, stated his opinion that the annuity was no part of the personal estate of William Mowbray.

The first¹ petition prayed that so much of the report as certifies the French annuity to be no part of the testator's personal estate may be set aside; and that it may be declared that the said annuity is part of his personal estate.

Sir Arthur Piggot, Mr. Richards, Mr. Wingfield, Mr. Horne, and Mr. Wear, for different parties, in support of the first petition. The French annuity being purchased in the testator's name, and no third person interposed as a trustee, the interest could not be transferred from him without certain acts, which were not done at the time of his death. It was therefore competent to him, during his life, to change his purpose, and to make some other provision for this lady by funds in this country; conceiving, perhaps, that she might return here. The authority given to purchase this annuity could not have been enforced against him during his life by a person claiming as a volunteer; nor can it be established against his estate after his death, the act which would have given the benefit of it against the personal representative not having been completed. Where a question is to be decided by a foreign law, the first step is an inquiry by the Master to ascertain what is the law of that country.

Sir Samuel Romilly and Mr. Bell, contra.

THE LORD CHANCELLOR [ELDON]. The other question involves not only the construction of the French law, and the point whether that has been sufficiently investigated, but further, whether the power of attorney amounts here to a declaration of trust. It is clear that this court will not assist a volunteer; yet, if the act is completed, though voluntary, the court will act upon it. It has been decided that, upon an agreement to transfer stock, this court will not interpose; but if the party had declared himself to be the trustee of that stock, it becomes the property of the *cestui que trust* without more; and the court will act upon it.

June 13th. THE LORD CHANCELLOR [ELDON]. These petitions call for the decision of points of more importance and difficulty than I should wish to decide in this way, if the case was not pressed upon

¹ Only so much of the case is given as relates to the petition. — Ed.

the court. With regard to the French annuity, the Master has stated his opinion as to the French law, perhaps without sufficient authority, or sufficient inquiry into the effect of it, as applicable to the precise circumstances of this case; but it is not necessary to pursue that, as upon the documents before me it does appear that though in one sense this may be represented as the testator's personal estate, yet he has committed to writing what seems to me a sufficient declaration that he held this part of the estate in trust for the annuitant.

Under this judgment, the order was pronounced dismissing the first petition.

FORTESCUE v. BARNETT.

IN CHANCERY, BEFORE SIR JOHN LEACH, M. R., JANUARY 20, 1834.

[*Reported in 3 Mylne & Keen, 36.*]

THE defendant, John Barnett, shortly after the intermarriage of his sister, Mary Barnett, with Henry White, executed an indenture dated the 17th of December, 1813, and made between himself of the first part, the said Henry White, since deceased, of the second part, Mary White, the wife of Henry White, of the third part, and the plaintiff, William Fortescue, and Thomas White, deceased, of the fourth part, whereby, after reciting that the Equitable Assurance Society had, by a policy of assurance dated the 27th of September, 1811, assured to be paid to the executors, administrators, and assigns of John Barnett, after his decease, £1,000, on payment of the annual premium of £25 11s., it was witnessed that, in consideration of the marriage then lately solemnized between Henry White and Mary White, and for making some provision for the said Mary White and her child and children, if she, or any such child or children, should survive John Barnett, he, the said John Barnett, assigned and transferred to William Fortescue and Thomas White the said policy of assurance, and the sum of £1,000 thereby assured, and all interest and produce to become due or payable by virtue thereof, and all his right and interest therein, to hold to William Fortescue and Thomas White, their executors, administrators, or assigns, upon trust, in case Mary White and all and every her child and children should happen to die in the lifetime of John Barnett, for John Barnett, his executors, administrators, and assigns, and to reassign the same to him and them accordingly; but if Mary White, or any child or children of Mary White, should happen to outlive John Barnett, then in trust that William Fortescue and Thomas White, their executors, administrators, or assigns, should invest the said sum of £1,000, and all other money which should become due on the said

policy, in the public stocks or funds, upon the trusts therein declared, for the benefit of Mary White and her child or children. The deed contained a covenant on the part of John Barnett, for himself, his executors and administrators, to pay and keep up the annual premiums payable upon the policy.

This deed was delivered to Thomas White, one of the trustees named therein, and remained in his possession till his death, which happened in October, 1832; but the defendant, Barnett, retained possession of the policy of assurance.

Shortly after the death of Thomas White, the deed was sent by one of his executors to William Fortescue, the surviving trustee, who, upon application at the office of the Equitable Assurance Society, was informed that no notice had ever been given to the society of the assignment of the policy; that, in July, 1830, a bonus of £795, payable upon the death of John Barnett, had been declared on the policy, which bonus was surrendered by Barnett to the society in the same month of July, in consideration of the sum of £394 15s.; and that in November, 1832, Barnett surrendered the policy itself to the society, in consideration of the further sum of £326 13s.

The bill was originally filed by Fortescue against Barnett alone, for the purpose of compelling him to replace or give security for the value of the policy and bonus so surrendered, and of all bonuses which might have accrued or have been capable of being declared thereafter, if the policy had not been surrendered; but the defendant demurred to the bill for want of parties, and, the demurrer being allowed, Mrs. White and her children were made parties by amendment, leave having been given for that purpose.

The bill prayed that the defendant, Barnett, might be decreed to pay to the plaintiff, or otherwise secure upon the trusts of the indenture of the 17th of December, 1813, the sum of £1,795, being the amount of the sum secured by the policy, together with the bonus declared thereon, and such further sum as should be sufficient to answer all future bonuses which, according to the regulations of the Equitable Assurance Company, would have accrued due in respect of the policy if it had not been surrendered.

The defendant, Barnett, by his answer, stated that the settlement of the policy was a mere voluntary act on his part, and made out of his personal regard for his sister; and that he executed the settlement under the impression that he should have the control of the policy during his life, and power, if he thought fit, to revoke or alter the disposition of the same. He further stated that the policy had been surrendered after the death of Mrs. White's husband, and with her consent, in order to save the expense of the annual premium, and with the understanding that the amount of the premium should be annually paid

to Mrs. White, which had, in fact, been done. The defendant further stated that, at the time of surrendering the policy, he executed a codicil to his will, whereby he made a provision for Mrs. White and her children to the extent of £1,000, and that he put Mrs. White, at the same time, into possession of a freehold estate of the value of £400, of which she had ever since received the rents and profits, and that he had devised such freehold estate to her eldest son by his will.

The question in the cause was, whether the defendant was or was not bound to replace or give security for the value of the policy.

Mr. Bickersteth and *Mr. Willcock*, for the plaintiff. There can be no question that the gift was, in this case, a complete gift, passing the legal interest in the policy to the trustees; for the deed of assignment, which transferred the policy and also the defendant's right and interest in it, was actually delivered by the grantor to one of the trustees, in whose possession it remained until his death, when it was handed over to the plaintiff, the surviving trustee. The plaintiff was bound, as well with a view to his own liabilities as to the protection of the interests of the *cestuis que trust*, to call upon the court to compel the defendant to replace or give security for the value of the policy, the proceeds of which he had applied to his own use, under the notion that the gift was revocable. Even if Mrs. White had acquiesced, as was said, in the acts of the defendant, she was not the only *cestui que trust*, her infant children were to be protected, and if the plaintiff had not provided for their protection by instituting this suit, he would have been responsible to them for the whole fund which had been diverted from its purpose by the defendant. Neither the circumstance of the settlement being made without valuable consideration, nor that of the defendant having retained the policy assigned by the settlement in his possession, can affect the rights of the parties upon whom the settlement was made, as between them and the grantor. A settlement duly executed, of which the trusts are declared, whether voluntary or not, is good against all the world, except creditors or purchasers, and the grantor cannot, by any subsequent act, revoke or defeat the trusts of such a settlement. *Barlow v. Heneage*; ¹ *Bale v. Newton*.² In *Sear v. Ashwell*,³ a voluntary deed in favor of younger children, though retained in the possession of the grantor, and afterwards destroyed by him, was established against legatees; and in *Bolton v. Bolton*,⁴ a voluntary deed executed in favor of younger children was held not to be revoked by a subsequent will. In *Ex parte Pye*, Lord Eldon said: "It is clear this court will not assist a volunteer; yet, if the act is completed, though voluntary, the court will act upon it." The only question in the present case, therefore, is, whether anything was wanting to the

¹ Prec. Ch. 211.

² 1 Vern. 464.

³ 3 Swanst. 411, n.

⁴ 3 Swanst. 414, n.

completion of the gift under the settlement. It appears upon the authorities that, even if the grantor had kept the deed itself in his possession, he could not have defeated the trusts which he had once created; still less could he defeat those trusts by the mere non-delivery of the policy. The gift of all the defendant's interest in the policy was perfect upon the delivery of the deed of assignment; and if notice of the assignment had been given to the assurance office by the trustees or *cestuis que trust*, the defendant could not have taken the steps to which he had resorted for the purpose of defeating his own grant. The omission of the trustees to give such notice cannot affect the interests of the *cestuis que trust*, and it is the interests of the infant *cestuis que trust* which it is the main object of this suit to protect.

Mr. Rolfe, for the widow, disclaimed any desire on her part to obtain relief in this suit, to which she was an unwilling party. The defendant had been her greatest benefactor, and she was satisfied that whatever steps he had taken in this transaction had been taken with a view to her benefit and the interests of her children.

Mr. Pemberton and *Mr. W. C. L. Keene*, for the defendant, Barnett, said there could be no doubt that where a trust was declared by deed, and the legal interest in the property which was the subject of the trust passed to the trustees, the court would execute the trust, whether the deed were voluntary or not. But, on the other hand, where a person only bound himself to do an act which did not pass the interest at law, but left something to be done to complete it, there, if the instrument were voluntary, this court would not interfere to give effect to it. Thus, in *Colman v. Sarrel*, which was the case of a voluntary assignment of stock by deed, no actual transfer of the stock having been made, the court refused to assist the volunteer. The same principle was recognized in *Ellison v. Ellison*,¹ by Lord Eldon, who said: "I take the distinction to be, that if you want the assistance of the court to constitute you *cestui que trust*, and the instrument is voluntary, you shall not have that assistance for the purpose of constituting you *cestui que trust*; as upon a covenant to transfer stock, &c., if it rests in covenant and is purely voluntary, this court will not execute that voluntary covenant; but if the party has completely transferred stock, &c., though it is voluntary, yet, the legal conveyance being effectually made, the equitable interest will be enforced by this court." The doctrine founded upon this distinction was laid down to the same effect in *Pulvertoft v. Pulvertoft*,² and in *Ex parte Pye* and *Ex parte Dubost*. Now, to apply this doctrine to the present case, the thing assigned here was a security for a debt payable after the death of the assignor, — a chose in action secured to the assignor's executors, administrators, and assigns. What difference could there be between a sum of stock and a sum of

¹ 6 Ves. 662.

² 18 Ves. 99.

money secured by a bond or policy of assurance? An assignment of stock by deed, no actual transfer of the stock having been made, and an assignment of a policy of assurance by deed, the policy remaining in the hands of the grantor, stood upon exactly the same footing, where the assignee was a volunteer, and in that character called upon the court for its assistance. In both cases something remained to be done by the grantor; the gift was not complete, but executory, and the court would not execute a voluntary covenant.

THE MASTER OF THE ROLLS. In the case of a voluntary assignment of a bond, where the bond is not delivered, but kept in the possession of the assignor, this court would undoubtedly, in the administration of the assets of the assignor, consider the bond as a debt to the assignee. There is a plain distinction between an assignment of stock where the stock has not been transferred, and an assignment of a bond. In the former case, the material act remains to be done by the grantor, and nothing is, in fact, done which will entitle the assignee to the aid of this court until the stock is transferred; whereas the court will admit the assignee of the bond as a creditor.

In the present case, the gift of the policy appears to me to have been perfectly complete without delivery. Nothing remained to be done by the grantor, nor could he have done what he afterwards did to defeat his own grant if the trustees had given notice of the assignment to the assurance office. The question does not here turn upon any distinction between a legal and an equitable title, but simply upon whether any act remained to be done by the grantor which, to assist a volunteer, this court would not compel him to do. I am of opinion that no act remained to be done to complete the title of the trustees. The trustees ought to have given notice of the assignment; but their omission to give notice cannot affect the *cestui's que trust*. The defendant appears to have acted in this transaction with the purest intentions, but he has rendered himself amenable to the jurisdiction of this court, and he must give security to the amount of the value of the policy assigned by the deed of settlement. The plaintiff is entitled to costs.

The decree was as follows:—

His Honor doth order “that the defendant, John Barnett, do enter into security to be answerable to all the parties who are or shall become entitled under the trusts of the indenture of the 17th of December, 1813, to the value of the policy of assurance effected in the Equitable Assurance Office, and bearing date the 27th of September, 1811, for £1,000 in the indenture mentioned, together with the bonuses, which, according to the rules and regulations of the said assurance office, have been declared, or might have been declared, or would hereafter have been [capable of being] declared on the said policy if the same had been kept up, and such security is to be settled by the Mas-

ter in rotation. And it is ordered that the said defendant, John Barnett, do pay the costs of the suit.”¹

WHEATLEY v. PURR.

IN CHANCERY, BEFORE LORD LANGDALE, M. R., MARCH 4, 1837.

[*Reported in 1 Keen, 551.*]

HARRIET OLIVER, by her will, dated the 1st of September, 1835, bequeathed to George Oliver and Susan Oliver the sum of £2,000 and other benefits, and appointed Simpson, since deceased, and the defendant Parr, executors of her will.

In September, 1826, Susan Oliver intermarried with John Wheatley: she died on the 16th of July, 1831, in the lifetime of the testatrix, leaving three children, issue of the marriage, who were the infant plaintiffs, John Richardson Wheatley, Susanna Mary Wheatley, and Harriet Wheatley.

In the year 1833 the testatrix Harriet Oliver had in the hands of her bankers, Messrs. Oakes & Co., of Sudbury, in Suffolk, the sum of £3,000, upon which sum the bankers allowed her interest at 2½ per cent. In the month of June in that year she gave notice to Messrs. Oakes & Co., by Charles Partridge, her confidential servant, that she would draw out the sum of £3,000 so deposited in the month of July following. She accordingly, on the 1st of July, delivered to Partridge a promissory note for £3,000, which had been given by the bankers in acknowledgment of the deposit, and she desired him to deliver the same to the bankers, and to direct the bankers to place £2,000 in the joint names of the plaintiffs and her own, as trustee for the plaintiffs, and to bring back the remaining £1,000 with the interest accrued thereon. Partridge executed these instructions, and the sum of £2,000 was entered in the books of the bankers, to the account of Harriet Oliver, as trustee for John Richardson Wheatley, Mary Wheatley, and Harriet Wheatley, and the following receipt or order given for it:—

“Sudbury Bank, July 1st, 1833. Fourteen days after sight I promise to pay Mrs. Harriet Oliver, trustee for John Richardson Wheatley, Mary Wheatley, and Harriet Wheatley, or order, two thousand pounds, with interest at 2½ per cent. For Oakes, Brown, Moore, and Hanbury. (Signed) Daniel Hanbury.”

¹ Roberts v. Lloyd, 2 Beav. 376 (Bond); Pearson v. Amicable Ins. Co., 27 Beav. 229 (Policy of Insurance); Blakely v. Brady, 2 Dr. & Walsh, 311 (I O U), *accord.* Par. Ward v. Audland, 8 Beav. 201 (Policy of Insurance), *contra.*

Conf. Godsal v. Webb, 2 Keen, 99; Collinson v. Pattrick, 2 Keen, 123. — ED.

A receipt for this promissory note was signed by Mrs. Oliver, and given to the bankers.

Harriet Oliver died on the 7th of January, 1834, possessed of the above-mentioned promissory note, and her will was duly proved by James Purr alone, who possessed himself of her personal estate; and he obtained payment from Messrs. Oakes & Co. of the sum of £2,000 and interest, in discharge of the promissory note. The money so received was invested by the executor in the 3 per cent consols, in his own name.

The bill was filed by the infant plaintiffs, by John Wheatley, their father and next friend, and it prayed a declaration that Harriet Oliver was a trustee of the £2,000 and interest for the plaintiffs, and that such principal sum and interest might be paid, or the stock in which the same had been invested transferred into the name of the accountant-general in trust for the benefit of the plaintiffs; and it further prayed for the usual reference as to their maintenance.

It appeared by the evidence of Partridge and Pratt, the principal clerks of Messrs. Oakes & Co., that Mrs. Oliver, on directing Partridge to give notice to the bankers that she intended to draw out the £3,000, had expressed to Partridge her desire that £2,000 out of the £3,000 should be placed in the bank for the benefit of Mrs. Wheatley's children; that Partridge, when he gave notice of her intention to the bankers, inquired how her wishes could be accomplished; and that Pratt suggested to Partridge that Mrs. Oliver might have a promissory note payable to her as trustee for the children, and that the old promissory note must be given up, and a new one to that effect prepared.

The question in the cause was, whether the defendant was a trustee for the plaintiffs, or for the next of kin, Mrs. Oliver having died intestate as to her residuary estate; and that depended upon the question whether the intention of Mrs. Oliver (which was not disputed) to create a trust for the plaintiffs had or had not been perfected.

Mr. Barber took a preliminary objection to the frame of the suit, on the ground that the next of kin of the testatrix ought to have been made parties, because, if the executor were a trustee for the plaintiffs, the next of kin would have a separate interest, which they should be present to defend.

Mr. Pigott cited *Brown v. Douthwaite*,¹ as an authority, showing that it was sufficient to bring the executor before the court, where there were residuary legatees; and now, by the late act,² the executor was declared a trustee for the next of kin wherever the residue was undisposed of. The next of kin therefore were sufficiently represented.

THE MASTER OF THE ROLLS held that the next of kin were not necessary parties.

¹ 1 Mad. 446.

² 1 Will. IV. c. 40.

Mr. Pemberton and *Mr. Pigott*, for the plaintiffs. It is clear that in this case a declaration of trust was made by Mrs. Oliver, and that nothing was wanting to complete the act by which that declaration was carried into effect. This court will not assist a volunteer; but if the act is completed, though voluntary, the court will act upon it. A mere voluntary promise or agreement to create a trust will operate nothing; but if the voluntary promise or agreement is perfected by an act which constitutes the relation of trustee and *cestui que trust*, this court will give effect to it. These principles are fully established by the authorities, and are clearly applicable to the present case. *Ex parte Pye*; *Ex parte Dubost*.

Mr. Barber and *Mr. Jeremy*, contra. There can be no doubt of the intention of Mrs. Oliver to create a trust; but the trust was not perfected by any act done in her lifetime; and the consequence was that the bankers found it impossible to resist the demand, made by the executor, for the sum secured by this promissory note, as part of Mrs. Oliver's personal estate. Had it been a trust, the demand might have been resisted; for there cannot exist a trust to be worked out through the medium of assets, nothing being demandable against assets in the hands of an executor, except debt or legacy. Could the bankers, in Mrs. Oliver's lifetime, have refused to pay her this sum of £2,000, or could the supposed *cestuis que trust* have sustained a bill against her claiming to have their interest in the promissory note secured for their benefit? That is the true test by which it is to be ascertained whether Mrs. Oliver had lost her control over the fund; whether it was a trust executed, or an imperfect act, which a court of equity would not carry into execution. In *Antrobus v. Smith*,¹ there was an indorsement on a navigation share in the handwriting of the owner, declaring that he assigned the same to his daughter. The instrument so indorsed was found among the papers of the father's executrix, and was held, upon a bill for an assignment, to be a voluntary and imperfect gift, which the court could not execute. So in *Cotteen v. Missing*,² a letter written by a residuary legatee to executors, consenting to a gift of £500 to a daughter of the testator, not actually appropriated during the lifetime of the writer of the letter, was held to be an imperfect gift, not amounting to a declaration of trust. *Gaskell v. Gaskell*³ is a case not very dissimilar in its circumstances to the present. There the testator, in his lifetime, directed his bankers to carry certain sums to the account of persons whom he had previously by his will appointed trustees for his wife and son; and these sums were accordingly carried by the bankers, in their books, to the account of those persons. No notice of the appropriation was given to the trustees, and there was some evidence that the object of the testator

¹ 12 Ves. 39.² 1 Mad. 176.³ 2 Y. & J. 502.

was to evade the legacy duty. It was held that the appropriations were void, and that the funds must be accounted for as personal assets of the testator. That the decision in this case did not turn upon the attempt to evade the legacy duty, is evident from these observations of Lord Chief Baron Alexander: "If a man wholly denudes himself of property, and places it in trustees over whom he has no sort of control, I will not say he may not do so in such manner as may be effectual to defeat the legacy duty. It is not, however, necessary for me to give my opinion on such a case on the present occasion; for here I consider it to be clear, that the testator had not parted with all control over the fund." In *Tate v. Hilbert*,¹ where a check on a banker and a promissory note were given without consideration, and the donor died before they were paid, it was held that these were not gifts which might be recovered in a court of equity. *Bayley v. Boulcott*² is also an authority which shows that the imperfect act, by which Mrs. Oliver indicated her intention of giving a benefit to the plaintiffs, would not have bound her, but that it might at any time have been recalled.

Mr. Pemberton, in reply. In all the cases cited on the other side, except *Gaskell v. Gaskell*, something was wanting to render the act a complete declaration of trust, and therefore the intended gift failed. But if a person once constitutes himself a trustee for the benefit of another by a complete act or instrument in respect of the whole, or any portion of his property, the trust attaches, and the gift is irrevocable, though the act or instrument is never communicated to the *cestui que trust*. Some of the dicta in *Gaskell v. Gaskell* are extremely questionable, and it would be difficult to support the decision, except upon the ground that the transfer was fraudulent. In the present case, the fund in question is, no doubt, part of the personal estate of the testatrix, but it is a part of her personal estate, upon which she has fixed a trust for the benefit of the plaintiffs. In *Ex parte Pye*, *Ex parte Dubost*, the testator had directed an agent in Paris to purchase an annuity for a lady, which was accordingly purchased, but in the name of the testator, the lady being deranged. The testator afterwards sent over a power of attorney, authorizing his agent to transfer the annuity to the lady. Before the annuity was transferred, the lady died, and Lord Eldon, with reference to this part of the case, says, "Though in one sense this may be represented as the testator's personal estate, yet he has committed to writing what appears to me a sufficient declaration that he held this part of the estate in trust for the annuitant." Upon the same principle, and for a similar reason, this is not a demand against the assets of the testatrix in the hands of her executors, *qua* assets, but against a specific portion of her personal property, in respect of which the testatrix, by a declara-

¹ 2 Ves. Jr. 111.

² 4 Russ. 345.

tion of trust, converted herself into a trustee for the benefit of the infant plaintiffs.

THE MASTER OF THE ROLLS (after stating the facts of the case). The question is, whether in the acts done by Mrs. Oliver, for the purpose of constituting herself a trustee for the benefit of Mrs. Wheatley's infant children, anything was wanting to accomplish her purpose. I am of opinion that she did constitute herself a trustee for the infant children, and that a trust was completely declared so as to give to the plaintiffs a title to the relief which they claim. Upon the death of Mrs. Oliver, the bankers were called upon to pay the money by her executor, who had undoubtedly a right to claim it, in his character of legal personal representative, upon whom, if Mrs. Oliver was a trustee, the trust devolved. The executor received the money, as part of the general assets of the testator. Those assets it was his duty to defend against the claim of the plaintiffs, until their right should be ascertained, and he has acted very properly, therefore, in refusing to part with the fund, without the authority of the court.

EDWARDS v. JONES.

IN CHANCERY, BEFORE LORD COTTENHAM, C., JANUARY 6, 19, 23, 1836.

[*Reported in 1 Mylne & Craig, 226.*]

IN the year 1819, John Nathaniel Williams, being indebted to Mary Custance in the sum of £300, gave her a bond for securing that sum with interest. In the year 1828 the said sum of £300 being still due, together with an arrear of interest, amounting to the sum of £123 15s., a second bond was given by J. N. Williams to Mary Custance, for securing the latter sum with interest thereon.

The whole of the two sums of £300 and £123 15s. remained due, upon the security of the two bonds, at the time of the death of Mary Custance.

On the 25th of May, 1830, only five days before her death, Mary Custance signed the following indorsement upon the bond of 1819: "I, Mary Custance, of the town of Aberystwith, in the county of Cardigan, widow, do hereby assign and transfer the within bond or obligation, and all my right, title, and interest thereto, unto and to the use of my niece, Esther Edwards, of Llanilar, in the said county of Cardigan, widow, with full power and authority for the said Esther Edwards to sue for and recover the amount thereof, and all interest now due or hereafter to become due thereon: as witness my hand, this 25th of May, 1830."

The bond of 1828 was usually kept with the bond of 1819. At the time at which the indorsement was signed, the two bonds were fastened together by a pin. Immediately after the indorsement had been signed, Mary Custance delivered or caused to be delivered both the bonds to Esther Edwards, the plaintiff in this suit. The bonds remained in the hands of the plaintiff until the filing of the bill. Mary Custance died on the 30th of May, 1830, having in the year 1829 made her will, in which she did not mention the bonds, or dispose of the residue of her property, but by which she appointed the defendant, Rice Jones, her executor, who duly proved the will. After Mary Custance's death, the defendant, who had been aware in her lifetime of the existence of the bonds, supposing that they had been lost, prevailed upon J. N. Williams, the obligor, to execute a new bond for the amount due upon the two old bonds, and at the same time gave to the obligor a bond of indemnity against any claim which might be made under the old bonds.

In the month of January, 1832, J. N. Williams, the obligor, died, and afterwards his widow and executrix paid to the defendant the amount for which the new bond had been given.

The bill stated that the plaintiff was a niece of Mary Custance, and that Mary Custance had a great affection for the plaintiff, and entertained, and at different times expressed, an intention to give or leave to the plaintiff the bonds, and the money due upon them. It alleged that Mary Custance delivered, or caused to be delivered, to the plaintiff, both the bonds, intending that the plaintiff should be entitled thereto, and to the moneys respectively secured thereby, in case of and after the decease of her the said Mary Custance, and expressing herself to that or the like effect; and the bill also alleged that the bonds, and the money due upon the same, were well given to the plaintiff, by Mary Custance, as a gift, or as a *donatio mortis causa*, and that the plaintiff became entitled thereto. The bill then went on to allege that, under the circumstances, the plaintiff was entitled to the sum due on the bonds, and that the defendant, so far as he had a legal right of action upon them, was a trustee for the plaintiff, and that he was a trustee for the plaintiff for the money received by him from the executrix of the obligor.

The prayer of the bill was, that it might be declared that the plaintiff was and is entitled to the principal and interest which was due upon the two bonds, and that the defendant might be declared to be a trustee thereof for the plaintiff, and that an account might be taken of what had been received by the defendant in respect of the several sums secured by the bonds, and the interest thereof respectively; and that the defendant might be decreed to pay to the plaintiff what should appear to have been so received by him, with interest thereon from the time when the same was received; and in case it should appear that the defendant

had not received from the estate of John N. Williams, the obligor, the whole of the principal and interest, then that the plaintiff might be at liberty to take such proceedings as she might be advised for the recovery thereof, in the name of the defendant; and in case it should appear that the defendant had released or discharged the estate of J. N. Williams, the obligor, from the debt, without receiving the whole thereof, then that the defendant might be decreed to make good the same.

It appeared, by the evidence, that the indorsement was written upon the bond before the day on which it was signed by Mary Custance; and that at the time at which she signed it, although upwards of eighty years of age, and laboring under a very painful disease, — cancer in the breast, — she was not worse in health than she had been for some time previously, and that she was not in bed, and that it was not then expected by those about her that her death would occur so soon afterwards as it did. It appeared also that the transaction took place about seven o'clock in the morning, all parties desiring that it should be concealed from a sister of Mary Custance; and it was proved that Mary Custance accompanied the act of signing the indorsement, by saying, that she was thereby giving the Castle Hill money (by which term she was accustomed to designate the money due upon the bonds) to the plaintiff.

The cause was heard before the Vice-Chancellor, who dismissed the bill with costs. The plaintiff now appealed from his Honor's decision.

Mr. Jacob and *Mr. Blake*, for the plaintiff. It will be argued for the defendant that the act which was intended to transfer the property in these bonds to the plaintiff was incomplete, and that, as it is not supported by valuable consideration, the court will not complete it. It was complete, however. The absence of a seal is immaterial: no seal is required to an instrument intended to pass personal property. Besides, there is a meritorious consideration of blood; one which would have been sufficient to support a covenant to stand seised. Uses before the statute stood in the same position as trusts now; if this transaction would have been sufficient before the statute to raise a use, so it will now raise a trust; it is true that a covenant to stand seised applies to real property; but that makes no difference.

Even if the gift were voluntary, the act was so complete, and the intent of the donor so definitively expressed, that the court will carry it into effect. In *Ex parte Pye*, Lord Eldon said, "If the act is completed, though voluntary, the court will act upon it." The same principle was recognized in *Ellison v. Ellison*.¹ If this assignment is not enforced, then no assignment of a chose in action can be carried into

¹ 6 Ves. 656.

effect. An assignment of a chose in action, though not good at law, is good in equity; it creates a trust. When a person, having a legal right to property, expresses an intention to alienate that property in favor of another person, he becomes a trustee for that person. Any expression clear enough to satisfy the court as to the intention will be sufficient; a mere parol declaration was sufficient, at common law, to create a trust as to real property; the statute requires a writing as to real property, but not as to personal property. In *Ex parte Pye*, Lord Eldon held that an authority to transfer an annuity into the name of a third person amounted to a declaration of trust in favor of that third person. The plaintiff's case is stronger than *Ex parte Pye*, because in the present instance no further act was intended to be done, and the transaction could only operate as a declaration of trust. *Sloane v. Cadogan*, decided by Sir W. Grant in December, 1808, shows the extent to which choses in action are assignable. It was there decided that a person who had a reversionary interest in stock standing in the names of trustees might make a voluntary settlement of it by deed. If, in this case, the chose in action had been equitable, the case of *Sloane v. Cadogan* would have been precisely the same. In *Fortescue v. Barnett*, which was a case of a voluntary assignment of a policy of assurance, the Master of the Rolls thought that the mere omission to hand over a bond or policy would not render the gift ineffectual. *Fortescue v. Barnett* decided with respect to a legal chose in action, what *Sloane v. Cadogan* decided as to an equitable chose in action. In the present case, there was not only an assignment but an actual transfer of that which constituted the title to the property. A bond is a thing which may be made a subject of voluntary assignment *inter vivos*, so as to bind the donor.

If this gift, however, cannot be established as a *donatio inter vivos*, it will take effect as a *donatio mortis causa*. To constitute a *donatio mortis causa*, it is not necessary that the gift should be expressly made on condition of being returned if the donor recovers. *Gardner v. Parker*; ¹ *Lawson v. Lawson*.² An act which may amount to an absolute gift may also take effect as a *donatio mortis causa*. *Murray v. The Earl of Stair*³ proves that a deed delivered as an escrow need not be stated to be delivered as such at the time. So if it was the intention of the parties that the gift in the present case should operate as a *donatio mortis causa*, it will have that effect, although it may not have been so declared at the time.

Mr. Kindersley and *Mr. Richards*, for the defendant. The case made by the bill is simply that of a memorandum importing, and stated by the giver to import, that in case of and after the death of the

¹ 3 Mad. 184.

² 1 P. Wms. 441.

³ 2 Barn. & Cress. 82.

donor, the subject should belong to the donee. The transaction can amount only to a particular form of *donatio mortis causa*. The plaintiff's sole case is, that the intention, as expressed by the deceased, was, "if I die, and when I die, you shall have these bonds."

The Vice-Chancellor was of opinion that the plaintiff, by her evidence, had disproved the case she had made by her record, and that it was essential to the validity of a *donatio mortis causa* that the gift should be made in expectation of death. The cases relied on by the plaintiff relate exclusively to transactions of gift *inter vivos*. *Ex parte Pye* is no authority for holding that a mere memorandum in which a party says he will recover the amount due and pay it to another party, is sufficient to make him liable in a court of equity as a trustee for that other party. It is very true that, in *Sloane v. Cadogan*, the Master of the Rolls said, that a voluntary settlement is binding upon the settlor and his representatives; but there has been no settlement here. *Fortescue v. Barnett*, so far as it has any bearing upon this case, rests entirely on a dictum of the judge. That case was one in which the act done was supported by a meritorious consideration; namely, a provision for the children of a marriage then recently solemnized.

The whole bill, with the exception of a single passage in which it is alleged that the bonds and the money due on them "were well given as a gift, or as a *donatio mortis causa*," relates to a case of *donatio mortis causa* only. It is a mere question of fact, whether the transaction was an absolute gift, or a gift on a condition *mortis causa*. The plaintiff does not pretend that the two bonds passed by the indorsement made on one of them; but she says that one passed by the assignment *inter vivos*, and the other by a *donatio mortis causa*. If the indorsement amounts only to a voluntary agreement, the court will not interfere. The relation of trustee and *cestui que trust* has not been established. The supposed assignment amounts to no more than a mere agreement. If the plaintiff's argument is good, it is strange that, in previous cases of *donatio mortis causa*, it should not have been contended that the gift was good as a gift *inter vivos* if it failed as *donatio mortis causa*.

Mr. Jacob, in reply. Most gifts *inter vivos* made by persons of advanced years are intended to take effect after death, and are made for the purpose of saving legacy duty. If a seal were necessary to pass personal property, we should not hear of questions between landlords and tenants, whether unsealed instruments are leases or agreements for leases. If the bonds had been given to a trustee for the plaintiff, instead of to the plaintiff herself, the present case would have been exactly the same as *Sloane v. Cadogan*. *Fortescue v. Barnett*, however, was the case of a mere legal chose in action.

THE LORD CHANCELLOR (after stating the substance of the bill).

The case being thus stated in the bill, it was argued at the bar that the bonds were delivered either by way of *donatio mortis causa*, or as a gift *inter vivos*; one question being, whether on the face of the record there was such an allegation as entitled the plaintiff to raise the latter point. Now, in order to be good as a *donatio mortis causa*, the gift must have been made in contemplation of death, and intended to take effect only after the donor's decease. And so the bill treats it; for it alleges that such was the intention of the testatrix. If it appeared, however, from the circumstances of the transaction, as stated, that the donor really intended to make an immediate and irrevocable gift of the bonds, that would destroy the title of the party who claims them as a *donatio mortis causa*; a proposition which is distinctly laid down in *Tate v. Hilbert*,¹ where a claim to property on the ground of its having been a *donatio mortis causa* was held to have failed, because, upon the facts disclosed, it appeared to be a transaction of present gift.

Several cases were cited for the purpose of controverting that proposition, and showing that words of gift might operate by way of *donatio mortis causa*. Of these the principal were *Gardner v. Parker*² and *Lawson v. Lawson*;³ which cases, however, so far from disproving the proposition, actually assumed it throughout. Those cases turned only upon the question, whether, notwithstanding the words used, the accompanying circumstances were not such as to lead to a legal presumption that that mode of title was contemplated by the donor which is constituted by a *donatio mortis causa*. In the latter case, the testator gave a purse of one hundred guineas to his wife, and desired her to apply it to no other use but her own. That case was never intended to infringe upon the former authorities. The reasoning of the court was, that the donor, from the language he used, must, of necessity, have contemplated his own death when he made the gift; for the money was to be applied to the wife's own use, and not to any use in which the husband was to participate; and upon that ground the court came to the conclusion, that although the words purported to be words of present gift, the accompanying words were such as showed that it was a gift in contemplation of death.

The rule, therefore, remains unaffected by any decisions on the other side; and we have now to look at this gift, to see whether the circumstances which attended it can be considered as importing a *donatio mortis causa*. Now, the transaction certainly cannot prevail as a *donatio mortis causa*. In the cases referred to, there was no written instrument or memorandum, — nothing but a mere general expression of gift, — and the court founded its conclusion upon the circumstances with which the gift was attended. In the present case, however, the transaction is in writing; and therefore, in looking for the intention, we are

¹ 2 Ves. Jr. 111.

² 3 Mad. 184.

³ 1 P. Wms. 441.

confined to the language in which that intention is expressed. It may be observed, that the very fact of the transaction being in writing is a strong circumstance against the presumption of the gift being intended to operate as a *donatio mortis causa*. Here is an instrument purporting to be a regular assignment, exactly in the same form as where the purpose is absolutely and at once to pass the whole interest in the subject-matter. A party making a *donatio mortis causa* does not part with the whole interest, save only in a certain event; and it is of the essence of such a gift that it shall not otherwise take effect. A *donatio mortis causa* leaves the whole title in the donor, unless the event occurs which is to divest him. Here, however, there is an actual assignment, by which the donor, Mrs. Custance, transfers all her right, title, and interest in the subject to her niece: and that is really the whole evidence of the transaction; for the testimony of several persons who were present proves that it was intended as a gift; and though others speak as to an intention being expressed inconsistent with the written document, very little attention can be paid to statements of what passed, when contradicted by the act of the party as evidenced by a written instrument. Independently of all the other circumstances, therefore, and independently of the grounds taken by the Vice-Chancellor in his judgment, I consider the language of the assignment sufficient to prevent this transaction from being considered as a good *donatio mortis causa*. There is no very precise evidence as to the time when these bonds got into the possession of the plaintiff. There is also a defect of evidence to show that at the time at which the transaction took place Mrs. Custance was in such a state of illness, or expectation of death, as would warrant a supposition that the gift was made in contemplation of that event. These considerations, however, do not appear to be very material, because I consider the language of the assignment itself to exclude the possibility of treating this as a *donatio mortis causa*.

The first question upon the other point is, whether the plaintiff has in this suit claimed the property as an absolute gift. The bill has, in fact, negatived the case of gift; for it states that the donor intended that the delivery should operate as a *donatio mortis causa*. Having made that allegation of fact, it is immaterial that there should be, in another part of the bill, an allegation stating a conclusion of law. If the question turned upon that point, if there were a case which would appear to constitute a gift, the court would give effect to it. Such, however, is not the case, because, whatever might have been alleged on the record, there was no ground for supposing that a case could be established which would support the transaction as a gift.

The transaction being inoperative for the purpose of transferring the bond, which was a mere chose in action, the question comes to be, whether the mere handing over of the bond,—supposing the record so

to have stated the facts as to have entitled the plaintiff to make such a claim, — whether such a transaction would constitute a good gift *inter vivos*; that is to say, whether the plaintiff would be entitled to the assistance of a court of equity, for the purpose of carrying into effect the intention of the parties. Now, it is clear that this is a purely voluntary gift, and a gift which cannot be made effectual without the interposition of this court. The circumstance of the bond having been afterwards paid, and the money having got into the hands of the defendant, cannot make any difference in the determination of the question, which must depend upon the same principles as if it had arisen before.

The rule that this court will not aid a volunteer to carry into effect an imperfect gift has been established by many decisions, and in particular by *Colman v. Sarrel*, *Ellison v. Ellison*,¹ and *Ex parte Pye*. The case of *Antrobus v. Smith*² comes nearer to the circumstances of this case than any of those which have been referred to. There was in that case an indorsement pretty much in the same language with the present assignment; and the general doctrine there laid down by Sir William Grant is extremely applicable here. In order to bring this transaction within the rule, that if there be a trust created, and the relation of trustee and *cestui que trust* once constituted, the court will execute the intention, it was argued here that the defendant became a trustee for the donee. The same argument was used in the case of *Antrobus v. Smith*, and it was met by Sir W. Grant with this observation: “Mr. Crawford was no otherwise a trustee than as any man may be called so who professes to give property by an instrument incapable of conveying it. He was not in form declared a trustee; nor was that mode of doing what he proposed in his contemplation. He meant a gift. He says he assigns the property. But it was a gift not complete. The property was not transferred by the act. Could he himself have been compelled to give effect to the gift by making an assignment? There is no case in which a party has been compelled to perfect a gift, which in the mode of making it he has left imperfect. There is *locus penitentiae* as long as it is incomplete.” Every word of that judgment applies directly to the circumstances of the present case. It is impossible, indeed, to distinguish the two cases; and it is equally impossible to question the doctrine there laid down.

It was said, however, that there were two later decisions interfering with this doctrine, *Sloane v. Cadogan* and *Fortescue v. Barnett*. Now, it is sufficient to prevent those cases from applying, that in neither of them was any intention expressed by the learned judge to depart from the established rule, but that in both the decision turned upon the question of fact, whether or not the relation of trustee and *cestui que trust* was actually constituted. In neither was it attempted to make

¹ 6 Ves. 656.

² 12 Ves. 39.

perfect an imperfect gift. In *Sloane v. Cadogan*, the claim was not against the donor or his representatives, for the purpose of making that complete which had been left imperfect, but against the persons who had the legal custody of the fund; and the question was, whether the transaction constituted them trustees of the fund for the *cestui que trusts*. Sir W. Grant came to the conclusion that it did; and the consequence was that they were bound to account. That case has been considered by Sir Edward Sugden as going a great way; but, upon the principle stated by Sir W. Grant, it is free from all possible question, for there was no attempt in that case to call in aid the jurisdiction of this court.

Fortescue v. Barnett falls precisely within the same observation, although there are some expressions in it, especially where the learned judge speaks of a bond which has been voluntarily assigned, being considered a debt to the assignee, which probably were not intended to convey the meaning they do. The case itself, and the judgment pronounced upon the facts, do not in any way touch the present question. There, a party had insured a life, and the contract of the office was, to pay to the party insuring, his executors, administrators, and assigns; but the practice of the office was stated to be, that upon an assignment, the office recognized the assignee, and the policy was, therefore, an assignable instrument. The policy was not assignable at law, but it was a title which, by contract, was assignable as between the parties; and the party in that case assigned, but the assignee did not give notice to the office, and, consequently, the original insurer dealt with the office, received a bonus, and then surrendered the policy. The Master of the Rolls in that case considered, as he naturally would, whether this transaction was not a gift, — whether it did not, in fact, confer a title on the assignee; and if it did, then, consistently with all the authorities, he considered that he was bound to give the assignment its full effect: and he put his decision expressly upon the fact that the transaction was complete, — that there was nothing further for the donor or the donee to do, — that the latter had nothing to ask further from the donor. Whether, upon the circumstances of that case, it was right or wrong to come to that conclusion, is a question with which I have nothing to do. The principle of the decision is quite consistent with the other cases; for it proceeds upon the same ground; namely, that if the transaction is complete, the court will give it effect. So far, therefore, are these two cases from being authorities in favor of the gift in the present case, the principle acted upon in them by the learned judges is quite consistent with my refusing to aid the plaintiff in the present bill.

On the whole, I see no reasonable ground for impeaching the decision of the Vice-Chancellor, and his decree must, therefore, be affirmed.¹

¹ *Sewell v. Moxsy*, 2 Sim. N. S. 189 (Debt), *accord*. — Ed.

FLOWER v. MARTEN.

IN CHANCERY, BEFORE LORD COTTENHAM, C., APRIL 6, 8, 1837.

[Reported in 2 Mylne & Craig, 459.]

THIS bill was filed by Sir James Flower for the delivery up of a bond for £4,500, which had been given by him to his father, under the following circumstances:—

The plaintiff, the son of Sir Charles Flower, became, in the year 1822, embarrassed in his circumstances, and a misunderstanding having in consequence taken place between him and his father, the latter applied to the defendants, Messrs. Muspratt & Marten, his old and intimate acquaintances, to interfere between himself and the plaintiff, and to assist in adjusting the differences then existing between them. This duty they accordingly undertook, after exacting from both parties (the father and son) a pledge and promise that they would abide by and perform whatever course Messrs. Muspratt & Marten should recommend. Having thus undertaken the mediation, they proceeded to investigate the affairs of the plaintiff, and they embodied the result of their determination in a letter addressed to Sir Charles Flower, dated the 28th of November, 1822, in which, after recommending that Sir Charles Flower should discharge his son's debts, and that any available funds of the plaintiff should be applied towards the payment of the money advanced, they recommended and determined as follows:—

“That your son shall give you his bond, bearing date from the last payment of any sum in the aforesaid statement, for £4,500, in satisfaction of pecuniary claims upon him, including the payments in the said statement to be yet made, such bond to be payable on demand, with interest, at £4 per cent per annum, but the bond is to remain in our hands, and not to be acted upon for the recovery of principal or interest within six years from the date of the bond, without the consent in writing of us, or of the survivor of us; and, moreover, that in case we or the survivor of us shall at any time within six years, by a memorandum in writing, direct the bond to be delivered up and cancelled, such cancellation, or an order from us or the survivor of us for that purpose, shall operate as a total extinguishment of the debt, both as to principal and interest.”

A bond was accordingly executed by the plaintiff to his father, in the penalty of £9,000, subject to the following condition: “Whereas, the said Sir Charles Flower has agreed to accept from the said James Flower, his son, the above-written bond or obligation, with a condition for payment of £4,500, and interest, as hereinafter mentioned, in full

satisfaction of all claims and demands upon him, and the said James Flower has agreed to enter into and execute such bond accordingly, but under the special understanding and agreement of both parties, and particularly of Sir Charles Flower, that the said bond shall remain in the hands of Robert Humphrey Marten and John Petty Muspratt; of the city of London, merchants, and shall not be acted upon for the recovery of principal or interest within six years from the date thereof, without the consent in writing of them, or of the survivor of them; and, moreover, that in case they or the survivor of them shall at any time within six years, by a memorandum in writing, direct the said bond to be cancelled, such memorandum or cancellation shall operate as a total extinguishment of the debt, both as to principal and interest." A condition then followed for rendering the bond void, on repayment of the £4,500 in 1823.

The bond, when executed, was delivered over to Mr. Marten and Mr. Muspratt, and remained in their hands uncanceled at the death of Sir Charles Flower in 1834. No part, either of the principal or interest, appeared to have been paid to the obligee in his lifetime.

This bill was filed against the executors of Sir Charles, and Mr. Marten, and Mr. Muspratt, by the plaintiff (Sir James Flower), to obtain the opinion of the court, and the plaintiff, by the bill, insisted that the purposes for which the bond had been given had been satisfied, and prayed that it might be delivered up.

Mr. Muspratt and Mr. Marten were examined, on behalf of the plaintiff, who deposed to the above facts, and particularly that Sir Charles, in conversation held after the arrangement, expressed himself satisfied with the conduct of the plaintiff, and that "his son's conduct was everything that he could wish." It was also proved to have been distinctly understood by the trustees, at the time the bond was executed, that it was taken by Sir Charles from his son "as a sort of security for the plaintiff's future good conduct and economy, and that it was not to be acted upon or enforced, if the plaintiff's mode of living and behavior were satisfactory to his father; and with those views they recommended the bond to be taken and deposited with them."

It appeared that an affectionate intercourse subsisted between them until the death of Sir Charles, and by his will the plaintiff was made tenant for life of the principal part of his very large property.¹

Mr. Wigram and Mr. Fisher, for the plaintiff.

Sir W. Horne and Mr. James, for the executors of Sir Charles Flower's will.

Mr. Geldart, for Messrs. Marten and Muspratt.

¹ The statement of facts, as given in 6 L. J. Eq. N. S. 167, has been substituted for that in the report by Mylne & Craig, and the arguments of counsel have been omitted.—Ed.

THE LORD CHANCELLOR. In this case a large sum of money was advanced by the plaintiff's father for the purpose of paying off the debts of his son. That advance may either have been made by way of a gift, or as a loan to the son. The taking a security for the amount is, *prima facie*, evidence that the father meant originally to treat the sum as a debt; but that presumption is capable of being explained away and rebutted; and even if the sum constituted a debt in the first instance, the debtor, according to the authorities, is at liberty to show that the creditor subsequently altered his intention and treated it as a gift.

In the present case, both circumstances concur. Upon the evidence of the gentlemen with whom the bond was deposited, I cannot suppose that the father intended to treat the money, which he advanced on his son's behalf, as being, at all events, a debt. He plainly meant to keep alive the security for a time, as a means of controlling and influencing the conduct of his son; and that was the main object of the instrument, to which the securing of the sum advanced was only collateral and subsidiary; but it does not appear from the testimony of the referees that the father ever actually dealt with the bond as creating a debt, or as forming a part of his assets.

With respect to the six years, during which the referees had the power of entirely discharging the obligation by executing a memorandum to that effect, the father had delegated that discretion to them as two of his confidential friends; and the discretion was wholly inconsistent with the notion that the bond was given merely, or principally, to secure the repayment of a sum of money. Within that period, events had taken place, which, as the referees themselves state, induced them to think that the claim was no longer available: the father and son were completely reconciled and united; and the conduct of the son throughout had been highly satisfactory to the father. Now, if the events took place which would render it the duty of the referees to exercise the trust reposed in them by indorsing upon the bond the proposed memorandum, of which the effect would be to avoid the security and discharge the debt at law, the situation of the plaintiff cannot, in a court of equity, be affected by their omission to do that which they ought, under the circumstances, to have done.

That, of itself, would be a sufficient ground on which to rest the plaintiff's title to relief. But there is also another ground, to be deduced from the principles which were distinctly laid down in the cases of *Wekett v. Raby*¹ and *Eden v. Smyth*; ² namely, that whether this obligation constituted a debt or not, either originally or during the continuance of the prescribed period, the father subsequently did not intend that it should be treated as a debt due from his son to his own

¹ 2 Bro. P. C. 386, Toml. ed.

² 5 Ves. 341.

estate, and be put in force accordingly. Nearly six years elapsed after these two gentlemen ceased, according to the letter of the condition, to have any authority or control; nevertheless, throughout the whole of that period, the father left the bond in their hands, and treated his son in a manner expressive of his entire reconciliation and satisfaction with him, and showing that the object of the transaction having been attained, he understood and considered the instrument as no longer subsisting and in force.

Both points seem to me to concur in the present case. Upon the evidence, I think that the bond was not, in the first instance, intended to operate as a debt at all events. At any rate, the father, by his subsequent conduct and his mode of dealing, showed that he did not mean it should now so operate, but that, in fact, he abandoned any claim in respect of it.

Under such circumstances, the authority of the cases referred to sufficiently establishes the jurisdiction of the court to deal with the instrument in question. There must, therefore, be a decree that the bond be delivered up to be cancelled.¹

MEEK v. KETTLEWELL.

IN CHANCERY, BEFORE SIR JAMES WIGRAM, V. C., APRIL 30,
MAY 2, 23, 1842.

[*Reported in 1 Hare, 464.*]

JOHN KETTLEWELL, by his will, dated the 4th of August, 1838, devised all his real estate to trustees, upon trust to pay the rents, issues, and profits thereof to his daughter, Hannah Kettlewell, during her life, for her sole and separate use, and after her decease he directed that his said trustees should stand seised of his said real estate in trust for such child or children of his said daughter, living at her decease, as she should by will appoint, and in default of appointment in trust for such child or children in equal shares, and in default of such issue upon such trusts as his daughter should by will appoint. And the testator bequeathed to the said trustees the sum of £11,000, upon trust to place the same out at interest upon government or real securities, and directed that they should stand possessed of the same, and the dividends and interest thereof upon the same trusts, in favor and for the benefit of

¹ *Eden v. Smyth*, 5 Ves. 341; *Yeomans v. Williams*, L. R. 1 Eq. 184; *Otis v. Beckwith*, 49 Ill. 121 (*semble*); *Leddel v. Starr*, 5 C. E. Green, 274; *Brinckerhoff v. Lawrence*, 2 Sandf. Ch. 400; *Gray v. Barton*, 55 N. Y. 68; *Wentz v. De Haven*, 1 S. & R. 312; *Lacey v. Lacey*, 7 Barr, 251, *accord*.

Tufnell v. Constable, 8 Sim. 69; *Cross v. Sprigg*, 6 Hare, 552, *contra*. — Ed.

his said daughter and her children as are thereinbefore declared of his real estate, or as near thereto as the nature of the property and the rules of law would admit; but if his said daughter should have no child living at her decease, then as to the sum of £100 (part of the said sum of £11,000), in trust for R. L. Dawson, and as to the residue of the said sum of £11,000 in trust for the next of kin of the testator's said daughter Hannah (exclusive of a husband), in a course of distribution according to the statute. The testator appointed the same trustees the executors of his will.

On the 11th of March, 1839, the testator died, leaving the defendant, Mary Kettlewell, his widow, and also the said Hannah, his daughter, surviving. The will was proved by the executors, and the £11,000 was duly invested in their names.

On the 20th of June, 1839, Hannah, the daughter, married the plaintiff, J. Meek, the younger.

By an indenture, dated the 10th September, 1839, and made between the defendant, Mary Kettlewell, of the first part, and the plaintiff, of the second part, reciting the will of the testator, and his death, and that the said defendant, in the event of the death of the testator's daughter, without leaving issue her surviving, would become entitled to the residue of the £11,000 as the next of kin of her said daughter, and reciting that the said defendant had contracted and agreed with the plaintiff to grant and assign the residue of the £11,000 to him, his executors, administrators, and assigns, it was witnessed, that, in pursuance of the said contract, and in consideration of the natural love and affection of the said defendant for the plaintiff, as the husband of her daughter, and in consideration also of the sum of 10s. by the said James Meek, the younger, to the said defendant paid, the receipt whereof was thereby acknowledged, the said defendant, Mary Kettlewell, granted, bargained, sold, assigned, transferred, and set over unto the plaintiff, his executors, administrators, and assigns, all that the said reversionary or expectant estate of her the said defendant of, in, and to the said sum of £11,000, and of and in the interest and proceeds to grow due and payable for the same: and also the said sum of £11,000 (after paying thereout the said sum of £100), and every part thereof, and all interest and proceeds thereafter to grow due or become payable for the same, upon trust, as to the said sum of £100 (parcel of the said sum of £11,000), for the said R. L. Dawson, according to the purport of the said will; as to the sum of £3,000, other parcel of the said sum of £11,000, in trust for the said defendant, her executors, administrators, or assigns, to and for her and their own absolute use and benefit; and as to the sum of £7,900 (the residue of the said sum of £11,000), in trust for the plaintiff himself, his executors, administrators, and assigns, to and for his and their own absolute use and benefit: and for

the better enabling the plaintiff to receive and take the said money and premises, the said defendant constituted him, his executors, administrators, and assigns, her attorney and attorneys irrevocable, in her name to demand, receive, and take the said premises of and from the said trustees, or whom else it should concern to pay or transfer the same, upon the decease of the said Hannah, the daughter of the said testator, without issue her surviving; and then followed the usual power to the plaintiff to give effectual receipts for the moneys which he should receive, and the common covenants for good title, and for further assurance.

On the 21st December, 1839, the plaintiff signed a memorandum on the back of the indenture of the 10th of September, 1839, which was in the following words:—

“Memorandum, — That I, the within-named James Meek, the younger, at the request of the within-named Mary Kettlewell, and upon condition that the will of my dear wife, Hannah, dated the 23d day of August last past, shall remain valid, unrevoked, unaltered, and uncancelled, at the time of my said dear wife’s death, have agreed, and do hereby agree, to allow and pay to the said Mary Kettlewell the further sum of £3,000 out of the within-named sum of £7,900. Witness my hand, this 21st day of December, 1839.”

On the 7th of January, 1840, Hannah, the plaintiff’s wife, died without issue, and thereupon defendant, her mother, became under the limitation in the will entitled to the £11,000, subject to the payment of £100 to Dawson. The fund remained standing in the names of the trustees, appointed by the testator. It did not appear that any notice had been given to the trustees, either of the assignment of the 10th of September, or of the subsequent indorsement thereon. The defendant, Mary Kettlewell, did not consent to the application of the fund according to the terms expressed by the assignment or the memorandum; and the trustees declined to act in conformity with those instruments without her sanction. The bill was then filed against the widow and the trustees, praying that the performance of the trusts of the indenture of assignment might be decreed.

Mr. J. Russell and Mr. Keene, for the plaintiff.¹

Mr. Sharpe, Mr. Wilbraham, and Mr. Willcock, for the defendant, Mary Kettlewell.

Mr. Robson, for the trustees.

VICE-CHANCELLOR. The plaintiff in this case has filed his bill to obtain the benefit of a trust declared in his favor, upon the indenture of assignment of the 10th of September, 1839. It is admitted that this assignment was voluntary, and that the memorandum of the 21st

¹ The arguments of counsel, which were stated by the reporter *ex relatione*, are omitted. — Ed.

December, 1839, has not in that respect altered the character of the transaction; and the defendant, Mrs. Kettlewell, insists that she is not bound by it, or by the memorandum, and she claims the fund in the hand of the trustees.

In support of the plaintiff's claim, I was referred to the well-known principle recognized and established by the cases of *Colman v. Sarrel*, *Ellison v. Ellison*,¹ and *Pulvertoft v. Pulvertoft*,² that where a trust is actually created in favor of a volunteer, a court of equity will enforce its execution, although it will not lend its aid to enforce a voluntary agreement. And according to Lord Eldon's decision in *Ex parte Pye* and *Ex parte Dubost*, a party may so constitute himself a trustee that a court of equity will execute the trust in favor of a volunteer. "It is clear" (says Lord Eldon in that case) "that this court will not assist a volunteer; yet, if the act is completed, though voluntary, the court will act upon it. It has been decided that, upon an agreement to transfer stock, this court will not interpose; but if the party has declared himself to be the trustee of that stock, it becomes the property of the *cestui que trust* without more, and the court will act upon it."

If the limits of the law were to be collected from the facts of the cases I have referred to, they would not perhaps go further than to establish, that where the legal interest in property is transferred or acquired in pursuance and in execution of an antecedent agreement or direction leading the uses or trusts of that property, or as part of the transaction creating the trust, the court will execute the trust though voluntary. There does not, however, appear to be any reason why the doctrine of the court should be so confined, provided the trust is actually created, and the relation of trustee and *cestui que trust* established between the parties. The language of Lord Eldon in the passage I have cited is not so limited; and from the late cases of *Wheatley v. Purr* and *Collinson v. Patrick*³ I conclude that Lord Langdale takes a similar view of the subject. The question, I conceive, must be simply this, whether the relation of trustee and *cestui que trust* has been actually established or not.

In the case of a formal declaration of trust by the legal or even beneficial owner of property, declaring himself in terms the trustee of that property for a volunteer, many considerations might arise which do not apply to the case now before me. The court in that case might not be bound to look beyond the mere declaration. If the owner of property having the legal interest in himself were to execute an instrument by which he declared himself a trustee for another, and had disclosed that instrument to the *cestui que trust*, and afterwards acted upon it, that might perhaps be sufficient; for a court of equity, adverting to what

¹ 6 Ves. 656.

² 18 Ves. 84.

³ 2 Keen, 123.

Lord Eldon said in *Ex parte Dubost*, might not be bound to inquire further into an equitable title so established in evidence. Again, if the equitable owner of property, the legal interest of which was in a trustee, should execute a voluntary assignment of the property, and authorize the assignee to sue for and recover the property from that trustee, and the assignee should give notice thereof to the trustee, and the trustee should accept the notice and act upon it, by paying the dividends or interest of the trust property to the assignee during the life of the assignor and with his consent, it might be difficult for the executor or administrator of the assignor afterwards to contend that the gift of the property was not perfect in equity. But such circumstances do not occur in the present case. There is here no formal declaration of trust. This is the case of a voluntary assignment of which the trustees never had notice, and which was never acted upon; and the question is, simply, whether the facts which have been established, as against Mrs. Kettlewell, have constituted the relation of trustee and *cestui que trust* between the plaintiff and the trustees of the fund, or produced the same effect by having estopped her from saying that such is not the case. Whether by the effect of the voluntary assignment of the 10th of September, 1839, and the memorandum, the beneficial interest in any part of the fund in question became in equity the property of the plaintiff.

Finding the doctrine of the court clearly defined, that where a trust is actually created, the court will act upon it in favor of a volunteer, and that a person may constitute himself a trustee for another, it might perhaps have reasonably been expected, that where the beneficial owner of a fund had done that which unequivocally amounted to a declaration on his part, that an interest in his property should thereby become vested in another, and the person in whom the legal interest was, and also the intended *cestui que trust*, had notice of that declaration, the court would, as against the party making the declaration, have fastened upon it, and held that he had thereby actually created that trust, which, in the case of volunteers, the rule of the court requires and acts upon. It is, however, impossible to say that the reported cases support such a proposition. Without referring to the cases in which parties have ineffectually endeavored to convert an imperfect gift into a trust, the case of *Edwards v. Jones* shows that the most clear intention to confer an interest by a present act may not be sufficient to create a trust in favor of a volunteer, although made by the party in whom the legal interest may be, and communicated by that party to the intended *cestui que trust*. In that case, the obligee in a bond made an indorsement upon it which purported in terms to be an actual assignment, and at the same time delivered the bond to the intended assignee. The Vice-Chancellor, and afterwards Lord Cottenham, on appeal, held this to be an imperfect gift, and not a trust. It was decided that the relation of

trustee and *cestui que trust* was not created by the transaction. I consider myself bound by the authority of that case, in the absence of a formal declaration of trust (whatever the effect of such a declaration might be), to hold that the question, whether a trust has been created or not, must be determined upon principles of strict law, and not merely from circumstances which may fail to place the intention of the parties out of the reach of controversy. The most distinct evidence of intention to pass an interest may not be conclusive.

It was said for the plaintiff in this case that, the legal interest being in the executors and trustees under the testator's will, the assignment of 10th September, 1839, under seal, would create a trust, and that the case of a bond, as in *Edwards v. Jones*, was distinguishable from the present. I confess myself unable to discover the ground for any judicial distinction between the cases, where the question is only whether a trust has been actually created. If, in the case now before me, Mrs. Kettlewell had assigned her interest in the property for value after her daughter's death, and notice of such assignment had been given to the trustees of the fund, before they had notice of the assignment under which the plaintiff claims, it would have been impossible not to hold that the assignment for value had prevailed over the earlier voluntary assignment. This would have been the case even if the first assignment had been for value. But this consequence would not necessarily have followed if the trust was actually created, provided the legal interest were not transferred to the assignee for value without notice of the prior trust. For personal property is not within the statute,¹ *Bill v. Cureton*,² *Jones v. Croucher*;³ and if the trust was once created, the property would belong to the *cestui que trust* without more, and no purchaser with notice of his right could call for the transfer of the legal interest. The cases I have referred to clearly establish this. My conclusion therefore is, that the relation of trustee and *cestui que trust* has not been established in this case, unless such an effect is to be attributed to the particular nature of the indenture of 10th September, 1839, as being in form a legal assignment.

Now, upon this part of the question, I observe, that the case of *Edwards v. Jones* is a direct authority that, in such a case, a writing not under seal will not create a trust, however clear the intention of the assignor may be. If, then, the voluntary assignment of the 10th of September, 1839, has given the plaintiff a title to the fund in question, it must be upon the ground that a deed under seal, though voluntary, is binding in equity by way of estoppel upon the party who makes it, as between himself and his assignee, although a writing not under seal would not have that effect. A decision founded upon this distinction would give an effect to an instrument under seal, as distinguishable

¹ 27 Eliz. c. 4 ; 30 Eliz. c. 18, § 3.

² 2 Myl. & K. 503.

³ 1 Sim. & St. 315.

from an equally clear intention expressed in a writing not under seal, beyond what I believe a court of equity has ever allowed to it. The case of *Colman v. Sarrel*, as reported in *Brown*, and explained in the subsequent cases, is a direct authority that, for the purpose of a case like this, an assignment under seal of that which does not pass at law by the operation of the assignment itself stands upon no better ground than a covenant or agreement to assign. I think the case of *Holloway v. Headington*,¹ is an authority for the same proposition; and, unless my experience at the bar entirely misleads me, the learned judge, by whom the latter case was decided, has always held that a voluntary assignment in a legal form, unaccompanied by any other acts, is not to be regarded as effectual to pass an equitable interest. The great experience of that learned judge, as a conveyancer, gives peculiar value to his opinion upon such a subject.

The present case is much less favorable to the plaintiff than many of the cases in which claims similar to the present have been rejected; for, in this case, Mrs. Kettlewell, at the time of the assignment, had nothing but an expectancy in the fund in question (like that of an heir in the lifetime of the ancestor); and the cases cited at the bar show that, with respect to such mere expectancies, a deed, unless founded upon value, will not necessarily operate by way of estoppel.

It was said that, if, in this case, I should come to the conclusion that the plaintiff has failed to make out a title to the relief he prays, I should, in effect, decide that which was inconsistent with the judgment of Sir William Grant in *Sloane v. Cadogan*. If such be the effect of my judgment (I think, however, it is not), I must shelter myself under the authority of Lord Thurlow in *Colman v. Sarrel*; the repeated approbation of that case by Lord Eldon; the disapprobation of *Sloane v. Cadogan* manifestly expressed by Sir Edward Sugden in the latest edition of his work;² the difficulty which in *Edwards v. Jones* Lord Cottenham obviously felt, in reconciling *Sloane v. Cadogan* with the other cases upon the authority of which he decided the former cases; and the opinion of the Vice-Chancellor of England, which I collect from *Holloway v. Headington*, as well as my belief that that learned judge does not consider a voluntary assignment alone as of any greater effect in equity than a mere agreement.

The late case of *Dillon v. Coppin*³ does not impugn the previous cases. In deciding against the plaintiff, I do not mean to express any opinion as to what the effect of a formal declaration of trust, or of the assignment in this case would have been, if Mrs. Kettlewell, at the time of executing it, had had more than a mere expectancy, and if, in

¹ 8 Sim. 324.

² Vend. & Pur. vol. iii. p. 297, 10th ed.

³ 4 My. & Cr. 647.

addition to the facts which here took place, notice of the assignment had been given to the trustees of the fund, and accepted by them. I decide only that a voluntary assignment of a mere expectancy, not communicated to those in whom the legal interest is, does not create a trust in equity within the principle of the cases relied upon by the plaintiff.

Dismissed the bill without costs.¹

M'FADDEN v. JENKYNs.

IN CHANCERY, BEFORE LORD LYNTHURST, C., JUNE 21, 22, NOVEMBER 4, 1842.

[Reported in 1 *Phillips*, 153.]

THE LORD CHANCELLOR.² This was an appeal from a judgment of Vice-Chancellor Wigram, upon a motion for an injunction to stay proceedings at law. The facts stated in support of the motion were shortly these: The testator Thomas Warry had lent a sum of £500 to the defendant Jenkyns, to be returned within a short period. Some time afterwards Warry sent a verbal direction to Jenkyns to hold the £500 in trust for Mrs. M'Fadden. This he assented to, and, upon her application, paid her a small sum, £10, in respect of this trust. The main question was, whether, assuming the facts to be as stated, this transaction was binding upon the estate of Thomas Warry. The executor had brought an action to recover the £500 so lent to Jenkyns. It is obvious that the rights of the parties could not, with reference to this claim, be finally settled in a court of law; and, if the trust were completed and binding, an injunction ought to be granted.

Some points were disposed of by the Vice-Chancellor in this case, which are indeed free from doubt, and appear not to have been con-

¹ Affirmed by Lord Lyndhurst, 1 *Phill.* 342. In *Penfold v. Mould*, L. R. 4 Eq. 562, Sir W. Page Wood, V. C., said, p. 564: This conclusion is said to be opposed to *Meek v. Kettlewell*, 1 *Hare*, 464; but *Meek v. Kettlewell* was founded on the logical consequences of the rule, that a voluntary assignment of an equitable chose in action is a voluntary agreement to pass something *in futuro*, and that the court will not decree performance of an agreement to assign. *Meek v. Kettlewell*, 1 *Hare*, 464, decided that a mere intention to pass an estate cannot be carried out, unless it be accompanied by an express declaration of trust.

That decision has been in effect overruled, and it is now held that any instrument may be a sufficient declaration of trust; no form being necessary: the only material question being, "Did the grantor, or did he not, mean at once to pass the property?" — *Ed.*

² The statement of facts, being substantially reproduced in the opinion of the court, has been omitted, together with the arguments of counsel. — *Ed.*

tested in this court, viz. that a declaration by parol is sufficient to create a trust of personal property; and that if the testator Thomas Warry had, in his lifetime, declared himself a trustee of the debt for the plaintiff, that, in equity, would perfect the gift to the plaintiff as against Thomas Warry and his estate. The distinctions upon this subject are undoubtedly refined, but it does not appear to me that there is any substantial difference between such a case and the present. The testator, in directing Jenkyns to hold the money in trust for the plaintiff, which was assented to and acted upon by Jenkyns, impressed, I think, a trust upon the money which was complete and irrevocable. It was equivalent to a declaration by the testator that the debt was a trust for the plaintiff.

The transaction bears no resemblance to an undertaking or agreement to assign. It was in terms a trust, and the aid of the court was not necessary to complete it. Such being the strong inclination of my opinion, and corresponding, as it appears to do, with that of the learned judge in the court below, and with the decision of the Master of the Rolls in the case to which he refers,¹ I cannot do otherwise upon this motion, and in this stage of the cause, than refuse the application.

I must not, however, be understood as pronouncing any conclusive opinion upon the facts of the case. The witness Bartholomew, a professional gentleman, I believe, swears distinctly and in positive terms as to the direction given by the testator; but there are some improbabilities in the case, and it is difficult to say, as the Vice-Chancellor justly observes, what may be the result at the hearing of the cause. As the appeal appears to have been encouraged, if not suggested, by the Vice-Chancellor, the motion must be refused without costs.²

¹ *Wheatley v. Purr*, *supra*, p. 26. — ED.

² In *Paterson v. Murphy*, 11 Hare, 88, a mortgagee by a certain writing directed his mortgagor to invest £200, part of the mortgage debt, when it became due, in consols, and after the decease of the mortgagee to transfer the consols and pay the dividends to certain persons named. Before any investment was made, the mortgagee countermanded the instructions, but it was decided by Sir W. P. Wood, V. C., that the first writing created an irrevocable trust in favor of the persons therein named. See, to the same effect, *Vandenberg v. Palmer*, 4 K. & J. 204; *Roberts v. Roberts*, 12 Jur. N. S. 971 (reversing s. c. 11 Jur. 992). — ED.

KEKEWICH v. MANNING.

IN CHANCERY, BEFORE SIR JAMES LEWIS KNIGHT BRUCE AND LORD CRANWORTH, L.JJ., NOVEMBER 6, 15, 1851.

[*Reported in 1 De Gea, MacNaghten, & Gordon, 176.*]

THE LORD JUSTICE KNIGHT BRUCE.¹ The present case has raised, necessarily or unnecessarily, a question which on several occasions, under different aspects, and in various circumstances, has been brought before this court, especially since the time of Lord Hardwicke, — the question, namely, whether an act or intended act of bounty, whether a gift or a promised or intended gift, was in truth a perfect act, a completed gift, resting neither in promise merely, nor merely in unfulfilled intention; or was incomplete, was imperfect, and rested merely in promise or unfulfilled intention.

Generally, this question, when arising here, is very material. For as, upon one hand, it is, on legal and equitable principles we apprehend, clear that a person *sui juris*, acting freely, fairly, and with sufficient knowledge, ought to have and has it in his power to make, in a binding and effectual manner, a voluntary gift of any part of his property, whether capable or incapable of manual delivery, whether in possession or reversionary, and howsoever circumstanced, so, on the other, it is as clear generally, if not universally, that a gratuitously expressed intention, a promise merely voluntary, or to use a familiar phrase, *nudum pactum*, does not (the matter resting there) bind legally or equitably. I have been speaking of transactions without any sealed writing. But though it is true that in cases where such an intention, such a promise, is expressed in a deed, it may bind generally at law as a covenant by reason of the light in which the particular kind of instrument called a deed is regarded at law, yet in equity, where at least the covenantor is living, or where specific performance of such a covenant is sought, it stands scarcely, or not at all, on a better footing than if it were contained in an instrument unsealed. The rules and the distinction or distinctions between them are, in theory, plain and simple enough, but are sometimes found to be of difficult application practically; nor, considering the position and circumstances, in many instances, of property, the administration of which, or the decision of the title to which, belongs to this jurisdiction, ought one to be surprised if he should find here occasionally a case so near the boundary line separating the two main classes, as to render it no light or easy task to say

¹ This judgment containing all that is essential to the understanding of the case, the rest of the report is omitted. — ED.

to which side of it the case belongs. Such instances have occurred not very unfrequently. To state, however, a simple case: Suppose stock or money to be legally vested in A. as a trustee for B. for life, and, subject to B.'s life-interest, for C. absolutely; surely it must be competent to C. in B.'s lifetime, with or without the consent of A., to make an effectual gift of C.'s interest to D. by way of mere bounty, leaving the legal interest and legal title unchanged and untouched. Surely it would not be consistent with natural equity or with reason or expediency to hold the contrary, C. being *sui juris*, and acting freely, fairly, and with sufficient advice and knowledge. If so, can C. do this better or more effectually than by executing an assignment to D.? It may possibly be thought necessary to the complete validity of such a transaction that notice should be given to A. Upon that we do not express an opinion.

Suppose the case only varied by the fact that A. and C. are the trustees jointly instead of A. being so alone. Does that make any substantial difference as to C.'s power, the mode of making the gift, or the effect of the act, C. not severing nor affecting the legal joint tenancy? C. would necessarily have notice. Possibly it may be thought material that A. should have notice likewise, but upon that we avoid saying anything beyond referring to *Meux v. Bell*,¹ and to *Smith v. Smith*, mentioned in *Meux v. Bell*.

It is probably or certainly in some instances the course of this jurisdiction to decline acting at the suit of those whom it terms "volunteers," though within that description a person claiming directly, and merely, under a gratuitous promise, oral or not under seal, which is *nudum pactum*, may be thought perhaps hardly to come, for such a person has in effect had no promise at all. In effect, no contract has been made with him. But whatever rule there may be against "volunteers," it does not apply to the case of one who, in the language of this court, is termed a *cestui que trust*, claiming against his trustee. For that which is considered by this jurisdiction a trust may certainly be created gratuitously. So that the absence of consideration for its creation is in general absolutely immaterial. To this doctrine Lord Eldon often referred. He did so especially in *Ellison v. Ellison*,² *Pulvertoft v. Pulvertoft*,³ and *Ex parte Pye*; in which two latter cases his language is sufficient to correct any erroneous notion of his views that some part of his judgment in *Ellison v. Ellison*, narrowly construed, might possibly in some minds create.

Ellison v. Ellison is among the valuable and instructive cases, various in kind and many in number, which we owe to the great learning, great carefulness, and great powers of that most distinguished man.

¹ 1 Hare, 73.

² 6 Ves. 656.

³ 18 Ves. 84.

With reference to the present litigation it is of the utmost importance. The necessity of sparing time as much as reasonably possible, and the recollection that probably every member of this bar is familiar with the report, alone prevent me from reading it now throughout. Let the report, however, be considered as read; and let it be particularly borne in mind that when Mr. Ellison executed the deed of 18th June, 1796, he had an equitable interest, and only an equitable interest, in the property, wholly personal, but partly movable and partly immovable, which was the subject of the deed; that the legal interest became afterwards, and probably at his own request, vested in him by means of the indenture of 3d July, 1797, which seems not to have taken notice of the deed of 1796, but to have been just such an instrument as would have been proper if the deed of 1796 had never existed; that the trustee of the property before, and independently of the deed of 1796, was the trustee of the deed of 1796, and the assignor of 1797; that whether this trustee, who had died before the suit, had notice of the deed of 1796 previously to his execution of the deed of 1797, or perhaps even in Mr. Ellison's lifetime, does not appear clearly, or does not appear at all, and that the deed of 1796 was after Mr. Ellison's death enforced against his residuary legatees; at the instance, I agree, of plaintiffs, of whom one was Mr. Ellison's executrix. The decision, however, seems not to have turned in any degree on that circumstance, but would, it is our clear impression, have been the same had the parties to the suit been reversed or had the eldest son been plaintiff alone. The ordering part of the decree which we have had extracted from the registrar's book is thus: "Whereupon, and upon debate of the matter, and hearing the deed of trust dated the 18th June, 1796, read, and what was alleged by the counsel on both sides, his Lordship doth declare that the trusts of the said deed, bearing date 18th June, 1796, ought to be performed and carried into execution, and doth order and decree the same accordingly. And it is further ordered and decreed, that it be referred to Mr. Ord, one of the masters of this court, to appoint a new trustee or trustees of the premises comprised in the said trust-deed, and that the share of the said testator, Nathaniel Ellison, of and in the said collieries, and the stock and effects belonging thereto comprised in the said deed, be assigned to such new trustee or trustees so to be appointed upon the trusts, and for the intents and purposes declared by the said deed concerning the same, and such new trustee or trustees is or are to declare the trusts thereof accordingly, and the said master is to settle such assignment; and it is ordered that the said master do tax all parties their costs of this suit, and that such costs, when taxed, be paid out of the estate of the said testator, and any of the parties are to be at liberty to apply to this court, as there shall be occasion." Some years afterwards occurred *Pulvertoft v. Pulvertoft* and *Ex parte Pye*. In the

former of these, Lord Eldon, after saying of Lord Thurlow, "I must take his opinion to have been, as I believe it was, that with a mere voluntary settlement this court has nothing to do," used this language: "The distinction is settled, that in the case of a contract merely voluntary (I do not speak of valuable or meritorious consideration), this court will do nothing; but if it does not rest in a voluntary agreement, but an actual trust is created, the court does take jurisdiction."

And in *Ex parte* Pye it is said by the same authority: "The other question involves, not only the construction of the French law, and the point whether that has been sufficiently investigated, but further, whether the power of attorney amounts here to a declaration of trust. It is clear that this court will not assist a volunteer; yet if the act is completed, though voluntary, the court will act upon it. It has been decided that, upon an agreement to transfer stock, this court will not interpose; but if the party had declared himself to be the trustee of that stock, it becomes the property of the *cestui que trust* without more, and the court will act upon it."

The case of *Cadogan v. Sloane* (commonly called *Sloane v. Cadogan*), the nature and effect of which the whole profession knows, from a valuable note in one of Sir Edward Sugden's works, and which we have examined in the registrar's books, is a decision also of great weight. The plaintiff there was the widow and executrix of Mr. William Bromley Cadogan. The defendants were the surviving trustee of the original settlement of 1747, and the executors of Lord Cadogan, of whom that trustee was one. It does not, we believe, appear that in *Cadogan v. Sloane* any point was, if any could have been, made, as to notice or the absence of notice, or as to the position of the legal title. It is observable, however, that Sir E. Sugden, in arguing the cause, said: "Here Mr. Cadogan did all he could, but that is not enough." Sir E. Sugden was certainly as unlikely as any man could be to omit any view or suggestion possibly favorable to the side on which he was counsel, though I think that I have heard him say that it was the first case that he ever argued in court, and there were other counsel of great consideration upon the same side. Perhaps *Cadogan v. Sloane* could not have been decided as to the point of gift or trust otherwise than it was, without contravening *Ellison v. Ellison*. In *Antrobus v. Smith*,¹ which was near the time of *Cadogan v. Sloane*, but we think before it, there were very particular circumstances. The property seems to have been Scotch, and though probably the legal title might have been rightfully and effectually transferred or changed by Mr. Crawford at his pleasure, he seems not to have acted, but seems so to have retained it. Sir W. Grant, who appears to have dismissed the bill on the ground that Mr. Crawford was not at his death a trustee for Mr. or Mrs. Antrobus,

¹ 12 Ves. 39.

upon the particular facts and in the particular circumstances of the case, did not in our opinion mean to do or to say anything of a nature with which that eminent judge's decision or language in *Cadogan v. Sloane* was at variance. In our view, *Cadogan v. Sloane* is entirely consistent with the decision in *Antrobus v. Smith*; but, if it is not, we think *Cadogan v. Sloane* the preferable and more correct decision,—subject only to the question, if any, of notice.

In an earlier case, *Colman v. Sarrel* (of which the *turpis contractus* or *turpis causa* was sufficient to dispose), the alleged donor, George Davy, had (as probably Mr. Crawford, in *Antrobus v. Smith*, had) the power and right of varying and transferring the legal title, but did not do so; nor did George Davy, we believe, make use of the term “confidence” or “trust,” or the word “trustee,” circumstances to which attention was due, but which perhaps were not of themselves decisive. We do not know certainly that if a man entitled beneficially to the absolute interest in stock standing in his name should deliberately and advisedly execute a deed declaring himself a trustee of the stock for certain purposes to take effect immediately, and should communicate and deliver the deed to the *cestuis que trustent*, or one of them, this court would decline to enforce the trusts against their author, because he executed the deed, though fairly and advisedly yet voluntarily, that is to say, without consideration. Nor do we know that an instrument may not be effectual as a declaration of trust, or tantamount to a declaration of trust, though it contain not the word “confidence,” the word “trust,” or the word “trustee.” And this we should have said, even if Lord Eldon had not in *Ex parte Pye* expressed himself and acted as he did with respect to the French annuity there in question. In the recent case of *Edwards v. Jones*, however, the subject of the alleged gift, a bond debt, was from its nature incapable of being legally assigned, incapable of being transferred at law. Notice, certainly, of the assignment does not appear to have been given to the debtor, though whether that circumstance was material or immaterial the decision seems not to have proceeded upon it, and was against the alleged gift. But *Fortescue v. Barnett*, decided by Sir John Leach, *Wheatley v. Purr*,¹ by Lord Langdale, and *Blakeley v. Brady*,² by Lord Plunkett, have without question followed *Cadogan v. Sloane*, and, if it could require support, supported it.

Having, with my learned brother's concurrence, made these remarks on his behalf as well as my own, I proceed to the particular circumstances of the case before the court.

In the year 1834, a sum of £10,500 three and a half or three and a quarter per cent bank annuities, and a sum of £500 per annum long annuities, were standing in the joint names of Mrs. Elizabeth Kekewich

¹ 1 Keen, 551.

² 2 Dr. & Walsh, 311.

and her daughter Miss Susannah Kekewich, in the books of the Bank of England. The property was derived immediately from Mr. Robert Kekewich, the deceased husband of one of the ladies, father of the other.

The ladies, under his will, held these sums as trustees for their own benefit; that is to say, for the benefit of Mrs. E. Kekewich for her life, and subject to her life-interest for the absolute benefit of Miss Kekewich.

They had therefore between them as well the whole beneficial as the whole legal interest in the property. In this state of things Miss Kekewich having attained her majority agreed to marry Sir Henry Maturin Farrington, and in contemplation of that marriage executed a deed of settlement dated the 1st of February, 1834, which was also executed by him. The material parts of this deed were thus:—

“ Now this indenture witnesseth, that in pursuance and execution of the said agreement, and in consideration of the said intended marriage, she, the said Susannah Kekewich (with the privity, consent, and approbation of the said Sir Henry Farrington, her intended husband, testified by his executing these presents), hath granted, bargained, sold, assigned, transferred, and set over, and by these presents doth grant, bargain, sell, assign, and set over unto the said Charles Kekewich, Samuel Trehawke Kekewich, and George Granville Kekewich, their executors, administrators, and assigns, all that the said capital sum of £10,500 new 3½ per cent bank annuities, and also all that the said annual sum of £500 long annuities, to which respectively the said Susannah Kekewich is entitled as aforesaid (subject to such life-interest therein of the said Elizabeth Kekewich as aforesaid), and all and every the funds and securities, or fund and security, upon which the same respectively or any part thereof now is, or are, or hereafter shall or may be, placed out or invested, and all dividends, interest, and annual proceeds and other produce of the same respectively, and all the estate, right, title, interest, benefit, property, claim, and demand whatsoever, of her the said Susannah Kekewich, of, in, to, and out of the said funds, stocks, and annuities, and each of them, and the dividends and other produce thereof, and of every part thereof respectively; to have, hold, receive, take, and enjoy the said stocks, funds, and annuities, and other the premises hereinbefore assigned or intended so to be, and every part thereof, unto and by them the said Charles Kekewich, Samuel Trehawke Kekewich, and George Granville Kekewich, their executors, administrators, and assigns, subject nevertheless to the life-interest therein respectively of the said Elizabeth Kekewich, as aforesaid, upon the trusts, and to and for the several ends, intents, and purposes hereinafter declared or expressed concerning the same; and for the more effectually enabling the said Charles Kekewich, Samuel Trehawke

Kekewich, and George Granville Kekewich, and the survivors and survivor of them, and the trustee or trustees of this settlement for the time being, to ask, demand, and receive the said capital, stock, and annuities hereinbefore assigned, and all necessary transfers of the same (from and after the decease of the said Elizabeth Kekewich), and all interest, dividends, and accumulations thereof, she the said Susannah Kekewich, with the privity and approbation of the said Sir Henry Maturin Farrington, her intended husband, testified as aforesaid, hath made, ordained, constituted, and appointed, and by these presents doth absolutely and irrevocably make, ordain, constitute, and appoint, and the said Sir Henry Maturin Farrington doth also make, ordain, constitute, and appoint the said Charles Kekewich, Samuel Trehawke Kekewich, and George Granville Kekewich, and the survivors and survivor of them, his executors and administrators, and the trustee or trustees of this settlement for the time being, their and each of their true and lawful attorneys and attorney for them and each of them, and in their or either of their names or name, but upon the trusts hereinafter declared, to ask, demand, recover, and receive, by all lawful ways and means whatsoever, from and immediately after the death of the said Elizabeth Kekewich, the said capital, stock, annuities, and premises hereinbefore assigned, and all necessary transfers of the same, and all interest, dividends, proceeds, and produce thereof respectively; and to give acquittances, releases, and discharges for the same, or any and every part thereof respectively, and upon non-payment or non-transfer of the said capital, funds, dividends, and produce, or any part thereof respectively, in the name or names of the said Sir Henry Maturin Farrington and Susannah Kekewich or either of them, or of the trustees or trustee of these presents for the time being, but upon the trusts hereinafter declared, to commence and prosecute all actions, suits, and proceedings, and use, exercise, and enforce all such or the like powers and remedies for compelling payment and transfer of the said capital, funds, dividends, and produce respectively as they, the said Susannah Kekewich and Sir Henry Maturin Farrington, or either of them, might or could do or have done if these presents had not been made. And the said Susannah Kekewich doth hereby (with the like privity and approbation of the said Sir Henry Maturin Farrington, testified as aforesaid) authorize and expressly direct that all and every the person and persons in whom the said stock and annuities, or any part thereof respectively, shall or may be vested on the decease of the said Elizabeth Kekewich, shall and do forthwith, on the decease of the said Elizabeth Kekewich, transfer and make over the said sum of £10,500 new 3½ per cent annuities, and also the said £500 per annum long annuities, and the dividends, interest, and produce thereof, unto the said Charles Kekewich, Samuel Trehawke Kekewich, and George Granville Kekewich,

and the survivors and survivor of them, or the trustees or trustee of this settlement for the time being, according to the purport, effect, and true intent and meaning of these presents. And it is hereby expressly agreed and declared, by and between all the said parties hereto, that they, the said Charles Kekewich, Samuel Trehawke Kekewich, and George Granville Kekewich, and their executors, administrators, and assigns, and the trustee or trustees of this settlement for the time being, shall stand possessed of and interested in the said sum of £10,500 new 3½ per cent annuities, and the said annual sum of £500 long annuities (subject nevertheless to the life-estate of the said Elizabeth Kekewich therein as aforesaid), and of and in the produce, interest, dividends, and annual proceeds thereof respectively upon the trusts, and for the ends, intents, and purposes following (that is to say), in trust for the said Susannah Kekewich, her executors, administrators, and assigns, until the said intended marriage, shall take effect and be solemnized." The trusts, after the solemnization of the marriage, were for Susannah Kekewich for her life for her separate use, and after her decease, as to the £500 long annuities, in trust for Sir Henry Farrington for his life, and, after the decease of the survivor, as to the whole of the trust funds, upon such trusts for Elizabeth Bradney (a niece of Susannah Kekewich), and the children of the intended marriage, and for the issue of Elizabeth Bradney, and for the issue of the children of the intended marriage, as Susannah Kekewich should appoint, and, in default of appointment, for Elizabeth Bradney and such children equally, as tenants in common.

The settlement then contained the following proviso: "Provided always, and it is hereby expressly declared by and between the said parties to these presents, that in case there shall be no child or children of the said intended marriage, or, there being such, all of them shall happen to die before his, her, or their share and interest under the provisions hereinbefore contained shall have become vested as aforesaid, then immediately after the decease of the said Susannah Kekewich (notwithstanding all or any of the trusts, powers, provisos and declarations hereinbefore expressed and declared) the said capital sum of £10,500 new 3½ per cent annuities, and the said £500 per annum long annuities (subject nevertheless as to the said £500 per annum long annuities to the interest therein of the said Sir Henry Maturin Farrington for his life as aforesaid), and the several dividends, interest, and annual proceeds thereof respectively shall be upon the trusts, and for the ends, intents, and purposes, hereinafter expressed and declared (that is to say), as to, for, and concerning the said £500 long annuities (subject to the interest for life therein of the said Sir Henry Maturin Farrington as aforesaid), and also as to the capital sum of £5,000 stock, part of the said capital stock of £10,500 new 3½ per cent annuities, and the

dividends, interest, and proceeds thereof, the same respectively, immediately upon the decease of the said Susannah Kekewich, shall be upon trust for the said Elizabeth Frances Bradney for her own benefit, and become vested in her on her attaining her age of twenty-one years, but not to be payable or transferable until after the decease of the said Susannah Kekewich." The residue of the trust funds was in the above events to be held upon such trusts as Susannah Kekewich should by will appoint, and in default of appointment in trust for her next of kin.

Soon after the execution of this instrument by Sir Henry Farrington and Miss Kekewich, and the three trustees of it, the intended marriage was solemnized. The husband, Sir Henry Farrington, died, however, soon afterwards, and there never was any issue of the marriage.

It will have been observed that Mrs. Elizabeth Kekewich was not a party to the deed, but contemporaneously with it, or at least, in Sir Henry Farrington's lifetime, she had notice of it. She survived him several years, and died shortly before the institution of the present suit. Upon her death, the legal title to the bank annuities having remained as I have stated, that legal title became vested, of course, by survivorship, in Lady Farrington solely, and so it now continues. But between the deaths of Sir Henry Farrington and Mrs. Elizabeth Kekewich, certain trusts of the bank annuities were for a valuable consideration created by Lady Farrington, so far as she could, and declared by her, which are at variance with the trusts of the settlement of 1834, and opposed to them. And the question in the cause is, whether against the trusts so created or attempted to be created, after Sir Henry Farrington's death, whether against the present wishes of Lady Farrington, who now desires to resist and defeat the settlement of 1834, that settlement ought to stand and prevail, the legal title, as I have said, having continually and uniformly remained as it was when the settlement of 1834 was made (for the death of Mrs. Elizabeth Kekewich is as to that nothing), and the dealings of Lady Farrington with the property having therefore had effect, if at all, only as to the equitable title.

The plaintiffs in the cause are the three trustees of the settlement of 1834, with Mr. and Mrs. Bailward. That lady was formerly Miss Bradney. She is the person of that name mentioned in the settlement of 1834, and is a granddaughter of Mr. Robert Kekewich. She has attained majority. The five plaintiffs seek the benefit of the settlement to its full extent; and I may here at once state that, in the opinion of Lord Cranworth and myself, the suit is constructed at least as favorably and beneficially for each of the plaintiffs as if any one or more of them had been the single plaintiff, or the only plaintiffs, and the others or other

of them had been among the defendants. Lady Farrington is of course one defendant. The others are the persons claiming under her dealings, since Sir Henry Farrington's death, which have been adverted to, and claiming therefore (as she does) against the settlement of 1834. It may be right here to mention that it does not appear whether there is or ever was a personal representative of Sir Henry Farrington; of course, therefore, it cannot be taken that a personal representative of that gentleman is a party to the cause.

The defendants resist the plaintiffs' claim, on the ground that, as the defendants insist, the provision, purporting to be made for Mrs. Bailward by the deed of 1834, was one merely of a voluntary kind, was nothing more than an intended or a promised gift not perfected, not completed, and ought therefore not to be enforced either at her instance, or at that of the trustees of the deed, by a court of equity.

The defendants contend in terms that neither Lady Farrington nor her mother ever became a trustee of the funds for the purposes of the settlement of 1834, or at least for the benefit, to any extent or in any event, of Mrs. Bailward. We should perhaps, however, qualify the last remark by saying, that though Lady Farrington may possibly die intestate, and though by possibility her sole next of kin at her death may be Mrs. Bailward (notwithstanding that Lady Farrington, now the widow of a second husband whom she married in 1838, has a child of that marriage living), we do not recollect that anything was said in the argument specifically as to any part of the contingent trusts provided by the deed to take effect, if there should be no issue of the marriage of 1834, in the event of Lady Farrington's intestacy. It is true, as has been stated, that Mrs. Bailward has attained majority; but that fact is, as to a portion of those contingent trusts, immaterial. Now, of the two persons in whom the legal title to the funds was at the time of the settlement of 1834, and at the time of the marriage that it contemplated, — the two persons in whom the funds were then actually vested at law, and who had then full and absolute power legally over them, — one was a principal party to the settlement of 1834, and the other, who, though not a party to it, had contemporaneously or before Sir Henry Farrington's death certainly notice of it, was beneficially interested in the funds, to the extent already mentioned, by a title paramount, and could not therefore have been rightfully or effectually required to make or join in a transfer of the funds to the trustees of the settlement of 1834; or to affect in any way her legal or equitable title in favor or consequence of that settlement. Why, then, should the gift (if that is the proper term) be considered inchoate only, or incomplete, or as resting merely in promise? What more could have been done that it was within the power or competency of Sir Henry Farrington or Lady Farrington to do or enforce? Was it to depend on the pleasure of the mother whether

the daughter should be able to give away her own property or not? Can a trustee, by saying, "I refuse to accept a trusteeship for the new claimant to a participation in the beneficial interest whom you, my *cestui que trust*, have introduced or endeavored to introduce: I object to the claim and oppose it; I will not deal with the legal title, nor shall you," — can a trustee, we repeat, by thus saying and thus acting prevent the *cestui que trust* from making an effectual gift of his interest in the trust property, or any part of it? Surely not. It may be said, and perhaps truly, that not only did Mrs. E. Kekewich never make or join in a transfer or declare herself a trustee for the purposes of the settlement of 1834, subject or not subject to her life-interest already mentioned, or so subject or not so subject, accept a trusteeship for those purposes, or consent to be a trustee either for the trustees of that settlement in that character or for Mrs. Bailward; but that no request having any such object was ever made, and that it is unknown and inconjecturable what Mrs. E. Kekewich would have done had any request or application been made to her. This we think immaterial. How the case would have stood if she had not had notice of the settlement in Sir Henry Farrington's lifetime, or if she had not had any beneficial interest in the funds, but had been merely a trustee of them for Lady Farrington, or if before the marriage Lady Farrington had survived her mother, it is altogether unnecessary for us to pronounce any opinion, and we decline doing so. It has been said that there is not to be found any express declaration, or express direction, or express contract, that the trustees of the funds, namely, Lady Farrington and her mother, should become or hold the funds as trustees of them for the purposes of the settlement of 1834, or for the trustees of it in that character, subject or not subject to Mrs. E. Kekewich's life-interest. Whether this observation is correct in point of verbal accuracy or not, we think it of no weight, being, as we are, of opinion, upon all the language of the settlement of 1834, taken together, that it is, for every purpose, of equal efficacy and value with a formal and plain declaration of the most explicit kind on the part of Sir Henry and Lady Farrington, that she and her mother should, subject to the life-interest already mentioned of the latter, stand possessed of the funds in trust for the purposes of that settlement, or for the trustees of it in that character.

We do not attribute essential importance to the clause thus worded: "And the said Susannah Kekewich doth hereby, with the like privity and approbation of the said Sir H. Maturin Farrington (testified as aforesaid), authorize and expressly direct that all and every the persons and person in whom the said stocks and annuities, or any part thereof, shall or may be vested on the decease of the said Elizabeth Kekewich, shall and do forthwith, on the decease of the said E. Keke-

wich, transfer and make over the said sum of £10,500 new three and a half per cent annuities, and also the said £500 long annuities, and the dividends, interest, and produce thereof, unto the said Charles Kekewich, Samuel Kekewich, and George Granville Kekewich, and the survivors or survivor of them, or the trustees or trustee of this settlement for the time being, according to the purposes, effect, and true intent and meaning of these presents." Certainly, however, that clause as a part of the settlement is not to be disregarded, and must be considered especially unfavorable to a portion of the defendants' argument.

We consider the plaintiffs entitled to a decree. But this is on the assumption that we are not precluded by authority from acting on our opinion of what is right. Are we, then, so precluded? The plaintiffs, of course, contend that we are not; the defendants, that we are.

The cases of *Ellison v. Ellison*,¹ *Pulvertoft v. Pulvertoft*,² and *Ex parte Pye* appear to us not merely to contain no doctrine opposed to the plaintiffs, but to be in their favor. Not only do we not question anything said in either of those cases by Lord Eldon, but we are persuaded that had the present case come before him he would have decided it against the defendants. Of *Antrobus v. Smith*³ we need say no more than has already been said. As to *Wheatley v. Purr*⁴ (the report of which has "1835" for "1825," and seemingly an incorrect marginal note), the author of the trust could have transferred the legal title, but appears not to have done so. Lord Langdale nevertheless established the trust. That case, and those of *Cadogan v. Sloane*, *Fortescue v. Barnett*, and *Blakeley v. Brady*,⁵ are in our opinion direct and clear authorities for the plaintiffs. But others cited during the argument are said to be strongly opposed to their title to relief. Whether these authorities, and particularly whether *Colman v. Sarrel*, *Colyear v. Lady Mulgrave*,⁶ *Ward v. Audland*,⁷ *Holloway v. Headington*,⁸ *Dillon v. Coppin*,⁹ *Jeffrys v. Jeffeerys*,¹⁰ *Godsal v. Webb*,¹¹ *James v. Bydder*,¹² *Beatson v. Beatson*,¹³ *Bayley v. Boulcott*,¹⁴ *Tufnell v. Constable*,¹⁵ *Gaskell v. Gaskell*,¹⁶ *Farquharson v. Cave*,¹⁷ *Edwards v. Jones*, and *Meek v. Kettlewell*, or any one or more of them, ought in our opinion to be considered as contravening or contravened by *Ellison v. Ellison*,¹ *Cadogan v. Sloane*, *Fortescue v. Barnett*, *Wheatley v. Purr*,⁴ or *Blakeley v. Brady*,⁵ or as opposed to the plaintiffs' title to relief, we think it un-

¹ 6 Ves. 656.⁴ 1 Keen, 551.⁷ 8 Beav. 201.¹⁰ 1 Cr. & Ph. 138.¹³ 12 Sim. 294.¹⁶ 2 Y. & J. 511.² 18 Ves. 84.⁵ 2 Dr. & Walsh, 311.⁸ 8 Sim. 382.¹¹ 2 Keen, 99.¹⁴ 4 Russ. 245.¹⁷ 2 Coll. 356.³ 12 Ves. 39.⁶ 2 Keen, 81.⁹ 4 M. & C. 647.¹² 4 Beav. 600.¹⁵ 7 Ad. & Ell. 789.

necessary to say; for assuming that contravention, assuming that opposition, we think nevertheless that *Ellison v. Ellison*,¹ *Cadogan v. Sloane*, *Fortescue v. Barnett*, *Wheatley v. Purr*, and *Blakeley v. Brady*,² support and are authorities for the plaintiffs' claim; that we are justified in following those five cases, so far at least as is necessary for the purpose of giving effect to it, circumstanced as it is, and we do so accordingly. In this we are certainly differing from the very able, learned, and careful judge before whom the suit originally came. He, however, in the particular station which judicially he filled with so much advantage to the country, may have considered himself placed in a position with respect to former decisions in which we do not consider ourselves to be.

Hitherto it will have been observed that I have treated the plaintiffs as being what are commonly called in equity "volunteers," as persons claiming under a trust created without consideration and by the mere bounty of Lady Farrington. But is the true view of the case so? The plaintiffs, relying little or not at all on the relationship of Mrs. Bailward to Lady Farrington and to her father, insist that the participation of Sir Henry Farrington in the settlement of 1834 precludes any effectual contention that Mrs. Bailward is a mere "volunteer." The plaintiffs say that Sir Henry Farrington stipulated and contracted as much for the provision under which Mr. and Mrs. Bailward claim as for any other part of the provisions of the settlement of 1834 (although she is not proved to have been related to Sir Henry Farrington, and although possibly his only acquaintance with her, if any, and his only interest in her, if any, were through his intended wife); and that even if, with the consent of Sir Henry Farrington or a personal representative of that gentleman, any part of the trusts or purposes of the deed might have been or could be varied or disappointed, there can without that consent be no such variation, no such disappointment.

We think this contention upon the plaintiffs' part not by any means unworthy of attention. How do we know that Sir Henry Farrington did not take a strong interest in the welfare of Mrs. Bailward? How do we know that he did not believe in the existence of a moral obligation, upon the part of Miss Kekewich, in the circumstances of the case, to make a provision for her niece? How do we know that he would have concurred in any settlement not making a provision for Mrs. Bailward? How do we know that, if he had refused to concur in a settlement, the marriage would not have taken place? How could it be known that he would not survive his wife? How is it clear that he was indifferent to her state of freedom as to property, after his death, if she should survive him, or to her marrying a second time, or the consequences of that step?

¹ 6 Ves. 656.

² 2 Dr. & Walsh, 311.

Were it in our opinion necessary to decide this point, we should probably first deem it prudent to consult carefully various authorities, from *Goring v. Nash*,¹ or earlier, down to *Davenport v. Bishopp*.² But we do not consider it necessary. We dispose of the cause on the other view of it, — that into which we have more fully entered; we decide it upon *Ellison v. Ellison*,³ upon *Cadogan v. Sloane*, and upon principle chiefly, but secondarily also upon *Fortescue v. Barnett*, *Wheatley v. Purr*, and *Blakeley v. Brady*,⁴ in the plaintiffs' favor.⁵

PRICE v. PRICE.

IN CHANCERY, BEFORE SIR JOHN ROMILLY, M. R., NOVEMBER 25,
DECEMBER 2, 1851.

[*Reported in 14 Beavan, 598.*]

ON the 8th of July, 1849, George Price, the late husband of the plaintiff, being seised in fee-simple of the messuage in question, and in which he and his wife resided, executed a deed-poll in these words: "July 8th, 1849. I hereby certify that I, George Price, collier, of Whitecroft, in the township of West Dean, and county of Gloucester, for and in consideration of the good-will which I bear towards my wife, Esther Price, also of the same place, have given and granted, and do hereby freely give and grant, to the said Esther Price, in the presence of my uncle, Samuel Price, of the same place, all my land, house, and chattels. And I hereby again declare that I, George Price, have absolutely and of my own accord given and granted the same, without any manner of condition, to the aforesaid Esther Price, and it is her sole and absolute property henceforth and for ever. In witness whereof, I have, this 8th day of July, in the year of our Lord 1849, set my hand and seal."

The deed was executed by George Price, and witnessed by William Tanner Sydney and Samuel Price.

Upon the execution of the deed, the grantor delivered it into the custody of one of the witnesses attesting the execution.

On the 20th of August, 1850, George Price died intestate, nothing further having taken place.

¹ 3 Atk. 186.

² 2 Y. & C. C. C. 453; 1 Ph. 701.

³ 6 Ves. 656.

⁴ 2 Dr. & Walsh, 311.

⁵ *Donaldson v. Donaldson*, Kay, 711; *Gannon v. White*, 2 Ir. Eq. 207; *Stone v. Hackett*, 12 Gray, 227, *accord*.

Bridge v. Bridge, 16 Beav. 315 (said in *Re King*, 14 Ch. D. 184, to have been decided on a wrong ground), *contra*. — ED.

Esther Price having continued in possession, Emma Price, the heir-at-law of George Price, commenced an action of ejectment against her, and obtained a verdict.

Esther Price filed the present bill against Emma Price, the heiress-at-law of George Price, praying to have it declared that the defendant was a trustee of the legal estate in the messuage, for the benefit of the plaintiff; for consequential relief, and for an injunction to restrain execution in the action of ejectment brought by Emma Price, to recover possession of the property, in which the verdict had been obtained.

The common injunction had been obtained for want of answer; and, the answer having been put in, the plaintiff now showed cause against dissolving the injunction, upon the merits confessed by the answer.

Mr. Eddis, for the plaintiff. The deed of 1849 did not convey the legal interest, but it operated to make the husband a trustee for his wife; the defendant, who represents him, is equally bound by the trust, and is a trustee for the plaintiff.

At law, a husband cannot convey to his wife;¹ but in equity he may divest himself of his equitable interest, and become a trustee for the separate use of his wife. It was admitted in *Walter v. Hodge*,² and appears by the authorities there referred to, that a husband may, in equity, make a gift to his wife, by engaging to hold as a trustee for her separate use; the only question is, the sufficiency of the evidence to establish the gift. Here the evidence of the deed is distinct, the husband has done all he was capable in law of doing to make the gift effective, and nothing remained to be done. In such a case, the court will hold him to be a trustee.

[THE MASTER OF THE ROLLS. If this transaction had been between strangers, would this deed have conveyed the property? Would the gift have been complete?³]

No; but the cases of strangers and a husband and wife differ, because by law there can be no conveyance as between husband and wife.

Mr. Sandys, for the defendant. This case must proceed on the deed alone, for the answer of the defendant, an infant, contains no admissions. The deed is a nullity; it is an incomplete, defective instrument; and the wife, who is a mere volunteer, is not entitled to the assistance of this court, to enforce an instrument legally invalid.⁴ In this respect, she stands in the same situation as a stranger. The law has now been settled, by a series of cases, that a mere volunteer under an incomplete gift cannot have the assistance of this court to

¹ See Littleton, § 168.

² 2 Swan. 92.

³ See 8 & 9 Vict. c. 106, § 2. (1 Oct. 1845.)

⁴ See *Moyse v. Gyles*, Prec. Ch. 124; 2 Vern. 385; 1 Eq. Ca. Abr. 293, pl. 2.

make the gift perfect. If George Price had conveyed the legal estate to trustees, in trust for his wife, the thing would have been complete.

THE MASTER OF THE ROLLS. I will consider this case.

THE MASTER OF THE ROLLS. It is not disputed that the deed in question was wholly inoperative at law; but the plaintiff contends that this deed created the husband a trustee for the separate use of his wife, and that the heiress-at-law of the intestate became, on his death and in like manner, a trustee for the plaintiff.

Upon the statement of this case by the counsel for the plaintiff I entertained a strong opinion that the deed did not create any trust which this court could enforce; but, as no cases were then called to my attention, I reserved my judgment, in the apprehension that I might, by acting upon my first impression, do injustice to the plaintiff, and in order that I might be able to examine the later authorities on this subject. This examination has confirmed me in the view I originally entertained, that this deed created no trust that this court can enforce.

In this case, it is first to be considered whether the deed would have created a trust enforceable in this court as between strangers; and, if it would not, whether the circumstance that the transaction is one between husband and wife produces any such relation.

As between strangers, I am of opinion that this deed would have been merely inoperative in equity as well as at law. The rule of courts of equity with regard to gifts *inter vivos* is, that they will be enforced only when the gift is completed, and when nothing remains to perfect the title of the donee. The cases of trust, however, are not exactly the same; for if the owner of an estate in fee-simple, having the legal estate, or one who has stock standing in his name, execute a deed declaring himself to be a trustee of the estate or of the stock for the benefit of another, and he delivers that instrument to the *cestui que trust*, and acts upon it, although no conveyance of the legal estate and no transfer of the stock should take place (though I do not know a case precisely in point), still that would probably be sufficient to create a trust,¹ and the observations of Lord Eldon in *Ex parte Pye* and *Dubost* support that doctrine. That case, however, is one of great peculiarity.

But, on the other hand, if the transaction purports to be a gift and not a declaration of trust, this court will not convert an imperfect gift into a trust. The case of *Edwards v. Jones* is distinct on this point.

¹ *Gray v. Gray*, 2 Sim. N. S. 273; *Steele v. Waller*, 28 Beav. 416; *Willcocks v. Hannyngton*, 5 Ir. Ch. 38, *accord*.

See also *Drosier v. Brereton*, 15 Beav. 221; *Gee v. Liddell*, 35 Beav. 621; *Crawford's Appeal*, 61 Pa. 52. — ED.

The obligee of the bond, in that case, made an indorsement on it in terms very similar to the present deed. It was to this effect: "I, Mary Custance, do hereby assign and transfer the within bond or obligation, and all my right, title, and interest thereto, unto and to the use of my niece, E. E., with full power and authority for the said E. E. to sue for and recover the amount thereof, and all interest now due or hereafter to become due thereon." Both Sir L. Shadwell, originally, and Lord Cottenham, on appeal, held this to be an imperfect gift and not a trust, and that the relation of trustee and *cestui que trust* was not created. This case was commented upon with approbation, and followed by Vice-Chancellor Wigram and Lord Lyndhurst, in *Meek v. Kettlewell*, and I have no doubt but that it correctly states the law relating to these instruments.

What is the case here? The instrument does not profess to be a declaration of trust, but to be a distinct gift. The giver treats it as such, and parts with the deed, which, if he had meant to constitute himself the trustee, he should not have done. It is, in truth, not a declaration of trust, but either a gift of the whole property or nothing. As a gift it is clearly inoperative; no estate passed, and, in truth, nothing took place, but the execution of the deed, the communication of it to the wife, and the delivery of it to the attesting witness. If I were to decide that this deed would be good as between strangers, I should really be deciding that if a man execute a deed, simply saying, "I hereby give all my estate at A. to another," and nothing further takes place, either to give possession or to transfer the legal estate, this court would compel delivery of the estate. This would, in my opinion, be contrary to the authorities, and I entertain no doubt but that, in such a case, equity would leave the parties to their legal rights, whatever they might be, and would not, in any respect, interfere to assist either party. The observations of Sir J. Wigram are admirably accurate and distinct on this head.

The next question is this: This was a transaction between husband and wife; the deed was executed for the benefit of the wife; it is expressed to be for her sole use. Did this circumstance give to the transaction a different character from that which it would have had if it had been one between strangers? Was there a good trust created as soon as the deed was executed? In other words, could the wife, during the life of the husband, have maintained a bill in this court, by her next friend, against the husband, to have it declared that he was a trustee of this property, and to have the trusts applied for her separate use? I am of opinion that no such bill could have been supported. It is true that Lord Thurlow, in *Colman v. Sarrel*, says: "Whenever you come into equity to raise an interest by way of trust, there must be a valuable consideration, or, at least, what a court of equity calls a meritorious consideration, such

as payment of debts, or making a provision for a wife or child." This, if taken literally, is, I think, inaccurately stated, because, if the relation of trustee and *cestui que trust* be clearly established, the court will act upon it, although there was no consideration at all; but if it be meant by this passage that instruments importing a gift are considered in a different point of view when there is a meritorious consideration than where there is none at all, or, in other words, that a voluntary gift by a man to his creditors, or to his wife or child, is to be regarded on different principles from one to a stranger, I am unable to discover on what principle such a proposition can properly rest; nor can I find it supported by any of the decided cases.

On the contrary, the opposite is expressly decided in the case of *Jeffreys v. Jeffreys*.¹ In that case, a father, by a voluntary settlement, conveyed certain lands to trustees, in trust to pay him an annuity for his life, and, after his death, to sell and divide the proceeds amongst his daughters; and, by the same deed, he covenanted to surrender certain copyholds to the uses of the settlement, but which he omitted to do. The court executed the trust of the freeholds, that being complete, but dismissed the bill with costs, so far as related to the copyholds.

Upon the whole, therefore, I am of opinion that the relation of trustee and *cestui que trust* was not created in this case; that the transaction was an imperfect gift, in regard to which equity will not interfere to assist either side, but will leave the parties as it finds them, and that, consequently, this injunction must be dissolved.²

WEALE v. OLLIVE.

IN CHANCERY, BEFORE SIR JOHN ROMILLY, M. R., JUNE 23, 1853.

[Reported in 17 Beavan, 252.]

THE testator possessed a number of United States bank shares, which were transferable by appearing or by attorney at the bank. Being at Lyons, he in July, 1845, wrote to the defendant, Ollive, his nephew; and, speaking of the certificates (some of which the defendant had received from the testator's agents, and the others in a tin box at the Bank

¹ Cr. & P. 138.

² *Searle v. Law*, 15 Sim. 95; *Peckham v. Taylor*, 31 Beav. 250; *Lambert v. Overton*, 11 W. R. 227; 11 L. T. Rep. 503, s. c., *accord*.

Airey v. Hall, 3 Sm. & G. 315; *Parnell v. Hingston*, 3 Sm. & G. 337, *contra*.—
ED.

of England, and for the latter of which the testator sent his nephew an order to receive), he said: "The whole of the contents of the said box I make a free gift to you, from pure affection, and require no remuneration of any kind in return for it." The testator also wrote to Messrs. Barings to transfer the shares to the defendant, "as it was his (the testator's) wish to make him a free gift of the whole amount for his own use, and renounce any claim of expectancy from him for the same from this day, July 16, 1845."

Shortly afterwards, a power of attorney for transferring the shares into the defendant's name was forwarded from England to the testator for his execution, which he accordingly executed and returned. The shares being very depreciated, the defendant, with the knowledge and approval of the testator, did not transfer the shares before the testator's death.

The testator died in January, 1847; and the defendant, Ollive, now claimed the shares.

Mr. R. Palmer and *Mr. Cankrien*, for the plaintiffs, argued that, as the shares still remained in the testator's name, they now formed part of his personal estate.

Mr. Teed and *Mr. Schomberg*, for the defendant, argued that there had been a valid and effectual gift of the shares made to Ollive, or a sufficient declaration of trust in his favor. They cited *Ex parte Pye*, where a testator directed an agent in France to purchase an annuity for his natural daughter, and the annuity was purchased in the name of the testator, who sent a power of attorney authorizing its transfer, which was not acted on until after his death. Lord Eldon said that the testator had committed to writing what seemed to him a sufficient declaration, — that he held this part of the estate in trust for the annuitant.

Mr. Roupell and *Mr. Knight*, for other defendants.

THE MASTER OF THE ROLLS. I think the case of *Ex parte Pye* does not constitute this a declaration of trust. It is clear that the testator did not intend to execute any declaration of trust, but to give the shares to his nephew. He wrote letters, and did everything he could in that way; but the gift was never completed. In *Ex parte Pye*, the testator directed an annuity to be purchased for the benefit of a lady, — but she being married and a lunatic, the agent purchased it in the name of the testator, and not of the lady; and the testator afterwards executed a power of attorney, authorizing its transfer to her. Lord Eldon thought that an annuity having been created expressly for this lady, the testator had by writing constituted a trust fund for her benefit.

In this case, if the testator had said that, until the transfer, he would hold the shares for his nephew's benefit, and pay him the dividends, that would have been a sufficient declaration of trust. Here, the intention was not completed: nothing was done to make the gift effectual; and

the case must be governed by the ordinary rule, which is, that the court will not assist a volunteer by making effectual an incomplete gift.¹

MILROY v. LORD.

IN CHANCERY, BEFORE SIR J. L. KNIGHT BRUCE AND SIR G. J. TURNER, L.JJ., JUNE 2, 3, 4, JULY 26, 1862.

[*Reported in 4 De Gex, Fisher, & Jones, 264.*]

THIS was an appeal by the defendant Otto, the personal representative of Medley, from a decree of Vice-Chancellor Stuart.

The bill was filed by Andrew Row M'Taggart Milroy and Eleanor Rainey, his wife, formerly E. R. Dudgeon, for the purpose of having new trustees appointed of a voluntary settlement made by the late Thomas Medley, and for recovering fifty shares of the Bank of Louisiana, which formed the subject of the settlement, and thirteen North American fire insurance shares, which were purchased with the income of the bank shares, together with the dividends upon all the above-mentioned shares, so far as they had not been paid over to the plaintiffs or one of them; and the bill also prayed that the defendant Samuel Lord, the trustee named in the settlement, might be decreed to make compensation to the plaintiffs and other the parties entitled under the settlement in respect of his having given up the certificates for the shares to the defendant Otto, the executor of Thomas Medley.

The settlement in question was made by a deed-poll, dated the 2d April, 1852, which was as follows:—

“Know all men by these presents, that I, Thomas Medley, of the city of New Orleans, on account of the love and affection I have for my niece, Eleanor Rainey Dudgeon, daughter of Daniel Dudgeon, of England, and in consideration of one dollar to me in hand paid, have conveyed, transferred, set over, and delivered, and by these presents do convey, transfer, set over, and deliver, unto Samuel Lord, of the city and county of New York, fifty shares of the capital stock of the Bank of Louisiana, now standing in my name in the books of the said bank, together with the certificate or scrip thereof, numbered 3,457, and dated the 6th March, 1852, under the corporate seal of the said bank, signed by W. W. Montgomery, president, and attested by R. M. Davis, cash-

¹ *Dillon v. Coppin*, 4 My. & Cr. 647; *Beech v. Keep*, 18 Beav. 285; *Lambert v. Overton*, 11 L. T. Rep. 503; *Moore v. Moore*, L. R. 18 Eq. 474 (*semble*); *Heartley v. Nicholson*, L. R. 19 Eq. 233; *Pennington v. Gitting*, 2 Gill & J. 208, *accord*.

Kiddill v. Parnell, 3 Sm. & G. 428, *contra*.

Conf. Antrobus v. Smith, 12 Ves. 39. — ED.

ier, and the dividends and profits thereof, to have and to hold to the said Samuel Lord and his legal representatives upon the trusts and conditions following, to wit, in trust to collect and receive the dividends and profits of the said stock, and apply them to the use and benefit of the said Eleanor Rainey Dudgeon, if I be living until the time of the marriage of the said Eleanor, and upon the further trust in case I die before the marriage of the said Eleanor, leaving her surviving me, then to transfer the said shares of stock, or the proceeds thereof, to the said Eleanor, for her own use and benefit; and upon the further trust in case the said Eleanor should during my lifetime marry, with my previous consent and approbation, then to apply the said dividends and profits to the use of the said Eleanor for life, and after her death to convey and transfer the said stocks or the proceeds thereof to her issue, if she leave any her surviving, and in default of such issue to convey and transfer the said stock or its proceeds to my next of kin; and upon the further trust if the said Eleanor shall have died before me without having married, or shall during my lifetime marry without my consent, then to reconvey and retransfer the said stock or its proceeds to me; and upon the further trust, on my direction at any time during my lifetime, or in his discretion after my death, to convert the said stock into money by sale thereof, and after such conversion to invest the proceeds thereof in his discretion in other stocks or upon a bond or mortgage at interest, to be held on the like trusts and subject to the like powers of conversion as the stock hereby transferred, and the dividends and profits thereof; reserving to myself the power at any time in writing, by will or otherwise, to direct and compel the said Samuel Lord to transfer the said stock or the proceeds thereof to the said Eleanor, for her own use and benefit absolutely, and also reserving to myself the power, in case of the death of the said Samuel Lord before me, of appointing another or other trustee or trustees in his place and stead. And I, the said Samuel Lord, do consent and agree to accept this transfer; and I hereby covenant and agree to and with the said Thomas Medley and the said Eleanor Rainey Dudgeon, severally and respectively, and their several and respective legal representatives, that I will observe, perform, fulfil, and keep the trusts and conditions hereinbefore declared."

This deed-poll was under the hand and seal both of Thomas Medley and of the defendant, Samuel Lord. At the time of the execution of the deed-poll, Samuel Lord held a power of attorney from Thomas Medley, whereby Medley empowered him "to take possession, charge, and control of all his goods, chattels, books of account, evidences of debt, choses in action, and claims of every kind, to buy and to sell and to transfer the stock of any incorporated company now belonging to him, or which might thereafter belong to him, and to collect and receive the dividends," and gave him general authority to act on his behalf. Soon

after the execution of the deed-poll, Thomas Medley delivered to the defendant Lord the scrip for one hundred and sixty-two shares which he then held in the Bank of Louisiana, including the scrip for the fifty shares comprised in the deed of settlement. About the same time, Medley gave to the defendant Lord a further power of attorney, authorizing him to receive the dividends then due and payable, and which might thereafter become due and payable on all or any shares of the capital stock of the Bank of Louisiana then standing, or which might thereafter be placed in his name in the books of the said Bank of Louisiana, and to give receipts, discharges, and acquittances for the same, with power to the said attorney to substitute an attorney or attorneys under him for all or any of the purposes aforesaid, and to do all lawful acts requisite for affecting the premises.

According to the constitution of the Bank of Louisiana, the shares in the bank were transferable in the books of the company, and all transfers were to be made by the proprietor or his lawful attorney, the certificates of stock being surrendered at the time the transfer was made; but it was to be collected from the evidence in the cause that, where a transfer was made by power of attorney, the power of attorney had to be left with the bank. No transfer was ever made into the name of the defendant Lord of the fifty shares comprised in the settlement; but the dividends upon the shares appeared to have been received by Lord, and remitted by him to the plaintiff Mrs. Milroy, then Eleanor Rainey Dudgeon, sometimes directly and sometimes through the medium of the settlor, by whom they were paid over to her, except as to one dividend, which appeared not to have been so paid over. The thirteen North American fire insurance shares were purchased, as it appeared, on the suggestion of Thomas Medley, out of the dividends of the bank shares and a bonus declared by the bank upon their shares; and the dividends upon the fire insurance shares were, as it appeared, paid to Mrs. Milroy, then Eleanor Rainey Dudgeon, along with the dividends upon the bank shares; but these insurance shares were purchased in the name of Thomas Medley.

In the year 1855, the plaintiffs intermarried, with the consent and approbation of Thomas Medley. In the month of November in that year Thomas Medley died, having by his will bequeathed to the plaintiff E. R. Milroy a legacy of £4,000, and appointed the defendant J. A. Otto to be his executor, who duly proved his will. After his death, the defendant Lord delivered to Otto the certificates both for the fifty Louisiana Bank shares and for the thirteen North American fire insurance shares. The plaintiff E. R. Milroy was the niece of Thomas Medley. She was educated at his expense, and lived with him after she was grown up until the summer of the year 1852, in the spring of which year he married the daughter of the defendant Samuel Lord.

The settlement which the bill sought to enforce was made in consequence of that marriage and of the plaintiff E. R. Milroy then ceasing to live with the settlor, and as a provision for her; and she was told by Thomas Medley that he had made the settlement on that account and for that purpose.

The Vice-Chancellor Stuart, at the hearing of the cause, and of a petition presented in it and under the trustee act, made a decree declaring that the fifty shares in the Bank of Louisiana were bound by the trusts declared by the deed-poll of the 2d April, 1852, and that the thirteen shares in the North American Fire Insurance Company, in the bill mentioned, belonged to the plaintiffs in right of the plaintiff Eleanor Rainey Milroy, the same having been purchased before her marriage with moneys belonging to her. The decree proceeded to appoint a new trustee, and to order the defendant Otto, an executor of the will of the settlor, to transfer the fifty shares in the Bank of Louisiana into the joint names of Lord and the new trustee, to be held by them upon the trusts of the said deed-poll, and also to transfer the thirteen shares in the North American Fire Insurance Company into the name of the plaintiff Andrew Row M'Taggart Milroy, for his own use. It was further ordered that the amount of the dividends accrued since the decease of Medley upon the fifty shares in the Bank of Louisiana, up to the time of the transfer, should be paid by Otto to Lord and the new trustee, to be also held by them upon the trusts of the deed-poll; and that the amount of the dividends accrued since the decease of Medley upon the thirteen shares should be paid to the plaintiff Andrew Row M'Taggart Milroy, for his own use. The costs of the suit were ordered out of Medley's estate.

The defendant Otto appealed from this decree.

Mr. Craig and *Mr. Charles Hall*, for the plaintiffs, in support of the decree. The settlement must be regulated, not by the law of Louisiana, but by that of New York, where it was made, and was to be carried into execution. Addison on Contracts; ¹ *Guepratte v. Young*.² The law of New York is the same as our own on this subject. Story, Eq. Jur.³ What took place amounted to a good declaration of trust. All was done that the settlor could do. *Ex parte Pye*; *Fortescue v. Barnett*; *Edwards v. Jones*; *Blakely v. Brady*; ⁴ *M'Fadden v. Jenkyns*; *Parnell v. Hingston*; ⁵ *Kekewich v. Manning*. If not, we have a remedy against the settlor's assets; for he was bound not to do anything in derogation of his own deed. *Williamson v. Codrington*; ⁶ *Deering v. Farrington*; ⁷ *Ward v. Audland*; ⁸ *Aulton v. Atkins*; ⁹ *Par-*

¹ Page 1034.

² 4 De G. & Sm. 217, 228.

³ Sects. 433, 706a, 787, 793a, 973, 987, 1040, 6th ed.

⁴ 2 Dru. & Walsh, 311.

⁵ 3 Sm. & Giff. 337.

⁶ 1 Ves. 511.

⁷ 6 Vin. Ab. 380, pl. 20, Cov. C.

⁸ 16 M. & W. 862.

⁹ 18 C. B. 249.

nell v. Hingston;¹ Dillon v. Coppin;² Saltern v. Melhuish.³ The settlor must have supposed that Lord would transfer the shares under the power of attorney; and this is enough to constitute a trust. It was a breach of trust to deliver up the certificates of the shares; and we are entitled, at all events, to relief as to them. Barton v. Gainer.⁴

Mr. Cotton (Mr. Bacon with him), for the appellant. There is nothing but an incomplete gift, which, being voluntary, the court will not complete. There was neither effectual assignment nor declaration of trust. In Kekewich v. Manning, Blakely v. Brady, and Fortescue v. Barnett, the assignments were held complete, because the settlor had made them as complete as he could; here the settlor might have transferred the shares. An incomplete assignment is not a declaration of trust; and the delivery of the certificates does not help the case. Dillon v. Coppin;⁵ Searle v. Law;⁶ Bridge v. Bridge;⁷ Woodford v. Charnley.⁸ The cases of Airey v. Hall⁹ and Parnell v. Hingston are against the current of authority. The remedy against the assets is not open on these pleadings, if there were any, but there is not; for there is no covenant, as there was in the cases where such a remedy has been given. What the plaintiffs ask is, that the court should imply a covenant for further assurance.

Mr. Malins and Mr. Kekewich, for Lord.

Mr. Craig, in reply, referred to Donaldson v. Donaldson.¹⁰

Judgment reserved.

July 26. THE LORD JUSTICE KNIGHT BRUCE. This is an appeal by the defendant Mr. Otto, the personal representative of Mr. Medley (the testator in the cause), against the decree in this suit pronounced by one of the learned vice-chancellors, on the 8th of March last, — a decree declaring and establishing against Mr. Otto, as Mr. Medley's executor, a title in the plaintiffs to an interest in fifty shares in the Bank of Louisiana, and to an interest also in thirteen shares in the North American Fire Insurance Company. [His Lordship here read the material parts of the decree.] It is insisted by Mr. Otto that neither of the plaintiffs had or has any interest recognizable by a court of justice in either set of shares or any part of them. The state of circumstances in which we find one set of shares is not exactly the same as that in which the other is placed.

First, then, with regard to the bank shares. They are claimed by the plaintiffs, under and by force of the instrument of the 2d of April, 1852,

¹ 3 Sm. & Giff. 337, 345.

³ 1 Amb. 247.

⁵ 4 Myl. & Cr. 647, 669.

⁷ 16 Beav. 315.

⁹ 3 Sm. & Giff. 315.

² 4 Myl. & Cr. 647, 671.

⁴ 3 H. & N. 387.

⁶ 15 Sim. 95.

⁸ 28 Beav. 96.

¹⁰ Kay, 711.

executed by Mr. Medley and the defendant Mr. Lord, which, set forth in the bill, is mentioned also in the decree. They stood in Mr. Medley's name before and at the time of his execution of that instrument, and continued so to stand until his death. He was during the whole time, and when he died, the legal proprietor of them, and, unless so far, if at all, as the beneficial title was affected by that instrument, the absolute proprietor of them beneficially likewise. He might, however, have affected the legal title. It was in his power to make a transfer of the shares so as to confer the legal proprietorship on another person or other persons. But, as I have said, no such thing was done. The instrument, however, of the 2d April, 1852, was not founded on valuable consideration. It was merely gratuitous and voluntary; and the principal question for our decision is, whether, in such a state of things, it is the duty of this court to enforce it specifically against Mr. Medley's executor, either on the ground that by it Mr. Medley constituted himself a trustee of the shares for the purposes mentioned concerning them in the instrument, or on the ground of contract or otherwise. It seems plain enough that the law of Louisiana, if applicable to the case, does not assist the plaintiffs, and that the laws and rules governing the courts at New York, where the instrument appears to have been executed, are, for any purpose now material, substantially the same as the laws and rules governing the courts here. I am of opinion that, according to our law, the instrument of the 2d April, 1852, was not sufficient to constitute, and did not constitute, Mr. Medley a trustee of the bank shares (and, in saying this, I do not forget the design appearing on the face of it, that Mr. Lord should become a trustee under it for the purposes which it mentions); nor do I think that, voluntary as the instrument was, it contained a contract specifically enforceable against Mr. Medley or his estate. The transaction or intended transaction left by him imperfect and incomplete he might have perfected and completed by a transfer. And, thinking the plaintiffs' case not helped by any of the circumstances stated respectively in the two answers of Mr. Lord or by any of the authorities mentioned in the report by Messrs. De Gex, Macnaghten, & Gordon, of the cause of *Kekewich v. Manning* (decided some years ago in this court), or by that decision, I find myself, though almost or altogether with regret, unable to agree with the decree as to the bank shares; and I believe my learned brother's view to be, in effect so far, the same as mine. But though not satisfied that the instrument, if a deed, contained a covenant on Mr. Medley's part, I do not wish to prevent or prejudice any action which the plaintiffs may wish to bring in their own names or the name of Mr. Lord against Mr. Otto. Then, with respect to the fire insurance shares. As to these I have some doubt, — a doubt immaterial, because, as it has been very agreeable to me to find, my learned brother is, as to them, of

opinion with the decree in favor of the plaintiffs. That being so, I have not the least objection to the addition in the plaintiffs' favor as to the certificates of the fire insurance shares, which my learned brother proposes, and will state. The circumstances are such that we need not, I think, alter, and I am not for altering, what the decree has done as to the costs of the suit, although, in the opinion of both of us, the plaintiffs' case partially fails, and though I doubt, as I have said, with regard to the fire insurance shares. And I am for dealing with the costs of the appeal in the same way.

THE LORD JUSTICE TURNER, after stating the facts of the case nearly in the same terms as above, proceeded as follows : —

Under the circumstances of this case, it would be difficult not to feel a strong disposition to give effect to this settlement to the fullest extent, and certainly I have spared no pains to find the means of doing so, consistently with what I apprehend to be the law of the court ; but, after full and anxious consideration, I find myself unable to do so. I take the law of this court to be well settled that, in order to render a voluntary settlement valid and effectual, the settlor must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property, and render the settlement binding upon him. He may, of course, do this by actually transferring the property to the persons for whom he intends to provide, and the provision will then be effectual ; and it will be equally effectual if he transfers the property to a trustee for the purposes of the settlement, or declares that he himself holds in trust for those purposes ; and, if the property be personal, the trust may, as I apprehend, be declared either in writing or by parol ; but, in order to render the settlement binding, one or other of these modes must, as I understand the law of this court, be resorted to, for there is no equity in this court to perfect an imperfect gift. The cases, I think, go further to this extent that, if the settlement is intended to be effectuated by one of the modes to which I have referred, the court will not give effect to it by applying another of those modes. If it is intended to take effect by transfer, the court will not hold the intended transfer to operate as a declaration of trust ; for then every imperfect instrument would be made effectual by being converted into a perfect trust. These are the principles by which, as I conceive, this case must be tried.

Applying, then, these principles to the case, there is not here any transfer either of the one class of shares or of the other to the objects of the settlement ; and the question, therefore, must be, whether a valid and effectual trust in favor of those objects was created in the defendant Samuel Lord, or settlor himself, as to all or any of these shares. Now, it is plain that it was not the purpose of this settlement, or the intention of the settlor, to constitute himself a trustee of the bank

shares. The intention was that the trust should be vested in the defendant Samuel Lord; and I think, therefore, that we should not be justified in holding that, by the settlement or by any parol declaration made by the settlor, he himself became a trustee of these shares for the purposes of the settlement. By doing so, we should be converting the settlement or the parol declaration to a purpose wholly different from that which was intended to be effected by it, and, as I have said, creating a perfect trust out of an imperfect transaction.

His Honor the Vice-Chancellor seems to have considered that the case *Ex parte* Pye warranted the conclusion that the settlor himself became a trustee by virtue of the power of attorney which he had given to the defendant Samuel Lord; but in *Ex parte* Pye the power of attorney was given by the settlor for the express purpose of enabling the annuity to be transferred to the object of the settlor's bounty. The settlor had, it appears, already directed the annuity to be purchased for the benefit of that object, and had even paid over the money for the purpose of its being applied to the purchase of the annuity; and then, when the annuity was, from the necessity of the case, purchased in the settlor's name, all that possibly could be wanted was to show that the original purpose was not changed, and that the annuity, though purchased in the settlor's name, was still intended for the benefit of the same object of the settlor's bounty; and the power of attorney proved, beyond all doubt, that this was the case. These facts appear to me wholly to distinguish this case from the case of *Ex parte* Pye. In my opinion, therefore, this decree cannot be supported upon the authority of *Ex parte* Pye; and there does not appear to me to be any sufficient ground to warrant us in holding that the settlor himself became a trustee of these bank shares for the purposes of this settlement.

The more difficult question is, whether the defendant Samuel Lord did not become a trustee of these shares. Upon this question I have felt considerable doubt; but, in the result, I have come to the conclusion that no perfect trust was ever created in him. The shares, it is clear, were never legally vested in him; and the only ground on which he can be held to have become a trustee of them is, that he held a power of attorney under which he might have transferred them into his own name; but he held that power of attorney as the agent of the settlor; and if he had been sued by the plaintiffs as trustee of the settlement for an account under the trust, and to compel him to transfer the shares into his own name as trustee, I think he might well have said: These shares are not vested in me; I have no power over them, except as the agent of the settlor; and without his express directions I cannot be justified in making the proposed transfer, in converting an intended into an actual settlement. A court of equity could not, I think, decree the agent of the settlor to make the transfer, unless it could decree the set-

tlor himself to do so ; and it is plain that no such decree could have been made against the settlor. In my opinion, therefore, this decree cannot be maintained as to the fifty Louisiana Bank shares.

As to the thirteen North American fire insurance shares, the case seems to me to stand upon a different footing. Although the plaintiffs' case fails as to the capital of the bank shares, there can, I think, be no doubt that the settlor made a perfect gift to Mrs. Milroy, then Miss Dudgeon, of the dividends upon these shares, so far as they were handed over or treated by him as belonging to her ; and these insurance shares were purchased with dividends which were so handed over or treated. It seems to me, upon the evidence, that these shares were purchased with the money of Mrs. Milroy, then Miss Dudgeon, and that the purchase having been made in Thomas Medley's name, there would be a resulting trust for Miss Dudgeon. I think, therefore, that as to these shares the decree is right, — the value of the shares being, as I presume, under £200, so that the case does not fall within the ordinary rule of the court as to the wife's equity for a settlement.

The case being thus disposed of as to the title to the shares, I see no ground for the claim to compensation raised by this bill. The certificates for the shares would follow the legal title, and as to the fifty bank shares would therefore belong to the defendant J. A. Otto, and as to the thirteen insurance shares the plaintiffs recovering those shares must recover the certificates also ; but this not being provided for by the decree, a direction for the delivery of these certificates should, I think, be added.

Upon the hearing of this appeal, it was contended for the plaintiffs that, so far as they might fail in recovering any of the shares in question, they were entitled to recover the value of them against the estate of Thomas Medley. I am not sure that this point can properly be considered to be open upon these pleadings ; but, whether it be so or not, I agree with my learned brother that the plaintiffs' claim in this respect cannot be maintained. There is no express covenant in the settlement ; and whatever might be done as to implying a covenant to do no act in derogation of the settlement, it would, I think, be going too far to imply a covenant to perfect it. If there be a breach of any implied covenant by the delivery of the certificates to the defendant J. A. Otto, the plaintiffs' remedy sounds in damages, and they may pursue that remedy at law ; for which purpose, if the plaintiffs desire it, there may be inserted in the decree a direction that they be at liberty to use the name of the defendant Lord, — of course upon the usual terms of indemnifying him. I have not adverted to the point which was raised as to this case being governed by the Spanish law ; for I think that, if that law was more favorable to the plaintiffs, the onus was upon them to allege and prove it. As to the costs of the suit, my learned brother being of

opinion that they ought to be paid out of the settlor's estate, I do not dissent. The decree must be altered accordingly, as to the several points to which I have referred.

GILBERT v. OVERTON.

IN CHANCERY, BEFORE SIR WILLIAM PAGE WOOD, V. C.,

JULY 1, 2, 5, 1864.

[*Reported in 2 Hemming & Miller, 110.*]

VICE-CHANCELLOR SIR W. PAGE WOOD.¹ The bill in this case was filed by the children of Henry Gilbert, who claim a fifth share in certain leaseholds under a voluntary settlement executed in 1789. It is not disputed that the plaintiffs are entitled to the relief they ask, unless the settlement is to be regarded as an incomplete voluntary settlement which this court will not carry into effect.

The origin of the title was this: The settlor held an agreement for a lease for ninety-nine years. As to the terms of this instrument I have no information except what is contained in the recitals in a subsequent conveyance and in the Master's report in a former suit. Whether, under the terms of the agreement and the circumstances at the time, the settlor was entitled to claim an immediate lease at the date of the voluntary settlement does not appear. In fact, he did not obtain a lease before executing the settlement.

By the terms of that settlement the settlor assigned to trustees the said plot of land and all his interest therein, to hold for the residue of the term of ninety-nine years, by the agreement agreed, or intended to be granted, upon trusts to pay the rents and perform the covenants, and then for the settlor for life with limitations over, under which the plaintiffs would be entitled to the share they claim.

Shortly after executing the settlement, the settlor took a conveyance to himself of the legal estate, and, after having done so, made his will in September, 1803, by which he recited the settlement, and, purporting to act under a power in the settlement, gave the property, as to five of the houses, to his son Henry, and as to the remainder, to his son William. This was invalid as an appointment, because the power was not exclusive, and the testator had other children.

After the death of the testator, a bill was filed by Henry and William against the executors. There were grandchildren of the testator then living, but they were not parties to the suit. The other children, who were defendants, asserted that the appointment to Henry and

¹ All that is material to this understanding of this case being contained in the judgment of the court, the rest of the report is omitted. — ED.

William was invalid, and a reference was made to the Master, who reported against the validity of the appointment, and found that the property was subject to the settlement, and that the testator had made no disposition under the power. The decree founded on this report recited that the defendants were put to their election, and had elected to give up their interests under the settlement (those being life interests not affecting the claims of grandchildren), and to take under the will.

Henry died in 1863, and this bill is filed by his children. In the mean time Henry became bankrupt, and his assignees put up for sale his life-interest, and sold it as such ; but, of course, the purchaser took a conveyance of all that the assignees could pass to him. The conveyance recites the settlement, the lease, the will, and the election of the children, and that the assignees had sold such interest as they had, and conveys all their interest accordingly. Under this deed the present defendant claims.

It is now insisted on behalf of the defendant that the voluntary settlement is invalid, on the ground that no legal interest passed, and for this contention the authority of *Bridge v. Bridge*¹ is relied on.

It appears to me that there are several reasons for upholding the settlement. In the first place, it contains a declaration of trust, and that is all that is wanted to make any settlement effectual. The settlor conveys his equitable interest, and directs the trustees to hold it upon the trusts thereby declared. Then he goes on to declare upon what trusts they are to hold. It is an exploded idea that in a voluntary instrument such a declaration of trust is insufficient. Such a declaration as I find here is just as good as if the testator had declared that he himself would stand possessed upon these trusts.

In the second place, there is another consideration which takes the case out of the scope of *Bridge v. Bridge*. In the inception of the transaction there is nothing to show that the settlor had the power of obtaining a lease before the time when he did so after the execution of the settlement. All that appears is, that no lease had been granted at the date of the settlement, and the court will take judicial notice of the fact that leases are not ordinarily granted under building agreements immediately, but are made dependant on the fulfilment of certain conditions. There is, therefore, nothing to show that the settlor did not, by the settlement, do all that it was in his power to do to pass the property. If this were not sufficient, it would be impossible to make a voluntary settlement of property of this description.

The whole doctrine of the court declining to assist voluntary settlements arose, in the first instance, in a great measure, out of two classes of cases : one, where the settlor retained possession and was considered to have reserved a *locus pœnitentiæ* ; and the other, where a settlor had

¹ 16 Beav. 315.

made an incomplete conveyance, and the volunteers came here to have it perfected. In this last class of cases, the court said that volunteers had no equity to claim such assistance against the legal estate. At the same time, where trusts had been actually executed, and administration only was asked, the court always gave its assistance just as if the settlor had declared himself a trustee.

On both the grounds I have stated I am of opinion that in this particular case the trustees were entitled to have the settlement carried into execution, and could have obtained a lease in a suit for specific performance against the person bound by the agreement. The circumstance that the settlor afterwards got in the legal estate did not displace the trusts which had been once effectually created, and such a circumstance was held by Lord Eldon, in *Ellison v. Ellison*, not to be a bar to claims which had once arisen. To this I may add, that, in this case, there is nothing to show that the settlor did not do everything which it was possible for him to do in order to obtain a binding trust.

I do not wish to say more as to *Bridge v. Bridge* than this: that the points there dealt with will require much consideration. A man who conveys his equitable interest may well be considered to do all that can be required, and it would be a great extension of the established doctrine on these subjects to hold that, if a legal estate is discovered, perhaps many years afterwards, to have been outstanding at the date of a voluntary settlement, the settlement itself is to be deprived of effect. Where a settlor by a voluntary instrument conveys all his interest, it may well be held that, if that interest proves to be merely equitable, the assignee becomes entitled to claim a conveyance of the legal estate from the person in whom it may be vested.

There is, further, in this case, the strong point that not only is the settlement recognized by the testator in his will, but that his son Henry accepted the estate under the settlement and the will. In the former suit, the court declared the property subject to the settlement in the presence of those in whom the legal estate was vested; it put other parties to their election in respect of it, and from that time to the present, a period of more than fifty years, everybody treated it as a valid settlement. I am of opinion, therefore, that the plaintiffs are entitled to have the trusts carried into effect, and to an account of rents from the death of Henry.¹

Declare plaintiffs entitled to one-fifth of the premises from the death of Henry Gilbert. Account of rents in case parties differ. Plaintiffs to have a vesting order as to one-fifth at their own expense. Defendants to pay costs of suit.

¹ *Bridge v. Bridge*, 16 Beav. 315 (said in *Re King*, 14 Ch. D. 184, to have been decided on a wrong ground), *contra*. — ED.

IN THE MATTER OF WAY'S TRUSTS.

IN CHANCERY, BEFORE SIR G. J. TURNER AND SIR J. L. KNIGHT
BRUCE, L.JJ., NOVEMBER 18, 1864.

[*Reported in 2 De Gex, Jones, & Smith, 365.*]

THIS was an appeal by the Attorney-General from an order made by the Master of the Rolls, who decided that a voluntary settlement of the 11th of May, 1852, was ineffectual.

At the time of the date of the voluntary settlement a sum of £2,500 old South Sea annuities (afterwards converted into reduced £3 per cent annuities) was standing in the names of the trustees of a deed dated the 18th of November, 1820, upon trust for Susannah Mary Way during her life, and after her death (subject to certain life-interests which determined in her lifetime) upon trust for Dame Catherine Cholmeley absolutely.

By a voluntary settlement dated the 11th May, 1852, and expressed to be made between Lady Cholmeley of the one part, and certain persons therein named as trustees of the other part, Lady Cholmeley assigned the fund to these trustees upon certain trusts, for the benefit of her two sisters, the daughters of George Way, during their lives, and after the death of the survivor of such daughters, upon trust to assign the fund to the owner for the time being of the mansion-house called Denham Place, in the county of Bucks, and to the rector for the time being of the church of Denham for certain charitable purposes.

This settlement, which contained no power of revocation, was formally signed, sealed, and delivered by Lady Cholmeley in the presence of, and her execution thereof was attested by, her then solicitor, Mr. Thomas Sismey, who had prepared the deed by her instructions, and had on a previous occasion read over the draft to her, and explained its contents to her. Lady Cholmeley kept the deed in her own possession, and the fact of its execution was never communicated to the trustees of the deed of 1820, or to the trustees nominated in the voluntary settlement, or to any person beneficially interested under that settlement, or, so far as appeared, to any other person.

On the 15th of April, 1863, Susannah Mary Way, the surviving tenant for life, died. Thereupon Mr. Sismey wrote to Lady Cholmeley to inform her that the fund might then be transferred to the trustees of the settlement of 1852, and to inquire whether those trustees were still living. In answer, Lady Cholmeley, on the 12th of May, 1863, wrote to Mr. Sismey as follows:—

“The deed of 1852 I destroyed, having made a codicil to my will

concerning the £2,500 you mention ; I believe the trustees are still living, but have to lament my sisters, Miss Anne and Charlotte Way, who are both dead."

In reply, Mr. Sismey wrote to Lady Cholmeley as follows : —

" I fear the destruction of the deed of 1852 does not render it inoperative, and that it must be treated as still in existence ; and, if I am correct in the view I take of the matter, the trust fund must be paid over to the trustees of that deed."

Lady Cholmeley, on the 29th of May, 1863, rejoined as follows : —

" I regret having delayed replying to your note of the 13th instant. The only difference I have made between the deed of 1852 and the codicil to my will is, that the latter leaves the stock between all the children of the late Rev. George Way and Mrs. George Way. There were three sons, the eldest has departed this life, leaving a son and two little daughters. I should be glad to know the view you take with regard to dealing with the £2,500, as I do not seem to understand it."

Nothing further passed between Lady Cholmeley and Mr. Sismey on the subject of the voluntary settlement, until her death, which took place on the 2d of February, 1864. She left a codicil, dated the 2d of March, 1857, by which she specifically bequeathed the fund in question to all the children of her late brother George Way who should be living at her decease, to be divided between them in equal shares.

In consequence of the doubt whether the fund passed under the voluntary settlement or under the codicil, the trustees of the deed of 1820 transferred the fund into court under the Trustee Relief Act.

The children of George Way who were living at the time of Lady Cholmeley's death petitioned for transfer of the fund to them ; and the Master of the Rolls made an order accordingly. From this order the Attorney-General, as representing the charitable gifts under the settlement of 1852, appealed.

The Attorney-General (Sir R. Palmer) and Mr. T. H. Terrell, in support of the appeal. The judgment of the Master of the Rolls proceeded on the ground that no notice of the assignment was given to the trustees. We submit that notice is not necessary to make an assignment complete, but only to exclude the title of third parties. The question as to the validity of a voluntary assignment of a chose in action has been put upon this : Has the assignor done all he could to make a complete assignment ? We say that here the assignor has done all that was necessary on her part : the giving of notice is an act usually done by the assignee, and seldom or never by the assignor ; and a notice given at any time before a fund is dealt with is sufficient, unless some other assignee has given prior notice. *Loveridge v. Cooper*.¹

¹ 3 Russ. 30, 58.

The present case is governed by *Sloane v. Cadogan* and *Fortescue v. Barnett*. *Meek v. Kettlewell*, if at variance with those cases, is overruled by *Kekewich v. Manning*, which is supported by *Blakeley v. Brady*; ¹ it may, however, be distinguished on the ground that the subject-matter there was a possibility, which is not the subject of assignment but only of contract, so that a valuable consideration is necessary to the validity of any dealing with it by act *inter vivos*. The Master of the Rolls followed his own decisions in *Bridge v. Bridge*² and *Beech v. Keep*,³ which, as we submit, are at variance with *Sloane v. Cadogan* and *Kekewich v. Manning*. The retention of the deed by Lady Cholmeley does not affect its validity, *Fletcher v. Fletcher*; ⁴ and, if it was once effectual, its destruction is of course immaterial. *Donaldson v. Donaldson*⁵ is in our favor.

Mr. Hobhouse and *Mr. W. W. Karlake* for the respondents. In the circumstances of this case, there would have been no equity against Lady Cholmeley herself to enforce the settlement had she been still alive. All the circumstances must be considered to see whether the settlor intended the transaction to be binding at once. *Cecil v. Butcher*.⁶ In all the cases where voluntary assignments of choses in action have been upheld, the transaction was intended to be complete as between the grantor and the grantee. Here Lady Cholmeley intended the arrangement to be purely private between herself and her solicitor, and to be incomplete until the death of the surviving tenant for life. The retainer of the deed by the settlor, coupled with the fact of its subsequent destruction and the absence of notice to the trustees of the deed of 1820, or to any beneficiary or trustee under the voluntary settlement, is conclusive evidence that she intended to reserve a power of revocation, or at any rate a control over the property. In such circumstances, the court has relieved against, or refused to act on a voluntary settlement. *Naldred v. Gilham*,⁷ recognized in *Cotton v. King*,⁸ *Boughton v. Boughton*,⁹ and *Doe d. Garnons v. Knight*; ¹⁰ and expressly followed in *Uniacke v. Giles*.¹¹ As to the cases cited on the other side, in *Fletcher v. Fletcher* the question was, whether the legal liability created by the covenant could be enforced against the estate; in *Blakeley v. Brady* there was a power of attorney; in *Fortescue v. Barnett* the deed was delivered to the trustees, and in *Donaldson v. Donaldson*¹² to the beneficiaries; in *Sloane v. Cadogan* and *Kekewich v. Manning* it was held

¹ 2 Drury & Walsh, *temp.* Plunkett, 311.

³ 18 Beav. 285.

⁵ Kay, 711.

⁷ 1 P. Wms. 577.

⁹ 1 Atk. 625.

¹¹ 2 Moll. 268. See *Worrall v. Jacob*, 3 Mer. 270.

¹² Kay, 711.

² 16 Beav. 315, 324.

⁴ 4 Hare, 67.

⁶ 2 Jac. & W. 565.

⁸ 2 P. Wms. 358.

¹⁰ 5 B. & C. 671.

that everything had been done which could be done; and in *Kekewich v. Manning* there was notice, — in that case, the question as to the absence of notice was expressly reserved, and *Meek v. Kettlewell* applies. At the time when Lady Cholmeley destroyed the deed she thought that by so doing she revoked it. This shows that the same notion was in her mind at the time when she executed and retained it. If the solicitor had asked her, as he ought to have done (*Nanney v. Williams*,¹ *Forshaw v. Welsby*²), whether she intended to bind herself absolutely or to have power to revoke the deed, she would have directed a power of revocation to be inserted. The impression on her mind at the time of execution, as to her power of revocation, being erroneous, the court will relieve her estate although she is dead. *Phillipson v. Kerry*.³ This relief may be given under the present petition, and it is not necessary to file a bill to set aside the deed of 1852.

Mr. Bristowe, Mr. Haynes, and Mr. Springall Thompson appeared for other parties.

The Attorney-General in reply.

THE LORD JUSTICE KNIGHT BRUCE. Upon the materials before the court the deed of 1852 must, in my judgment, be taken to have been duly and completely executed by Lady Cholmeley. There is no evidence before us that its execution was unfairly or improperly obtained, or that she executed it under any mistake, misapprehension, or erroneous advice. In these circumstances the deed must be supported, although no notice of it was ever given to the trustees or to any other person. That the deed was retained by Lady Cholmeley and afterwards destroyed by her, does not, in my judgment, alter the case. We are not now, however, at the hearing of a cause, the case coming before the court only on a petition under an act for the relief of trustees, and it is alleged that evidence can be adduced to show that Lady Cholmeley executed the deed under misapprehension, mistake, and erroneous advice. If the parties claiming against the deed desire an opportunity of filing a bill to impeach it on any of those grounds, I am not prepared to say that such an opportunity ought not to be given them; but if the case is to be decided on the evidence as it stands, I dissent with great respect from the view of the Master of the Rolls, and am of opinion that effect ought to be given to the deed.

THE LORD JUSTICE TURNER. I am of the same opinion. I am not sorry that this case has been brought before us, as I have long anticipated, from the observations of Sir James Wigram in *Meek v. Kettlewell*, that the question must some day call for decision as to the effect of a voluntary settlement which has been retained by the grantor without notice of it being given to any person. I think that, according to the principle of the modern decisions, if the deed is duly executed,

¹ 22 Beav. 452, 462.

² 30 Beav. 243.

³ 32 Beav. 628.

effect must be given to it, notwithstanding the retainer and the absence of notice, and it is satisfactory to me to find that in *Donaldson v. Donaldson*¹ the Vice-Chancellor, Sir W. P. Wood, has taken the same view. In *Naldred v. Gilham*,² the circumstances were special. In *Ward v. Lant*,³ *Birch v. Blagrove*,⁴ and *Cecil v. Butcher*,⁵ the deeds were executed for particular purposes of the grantors without any intention of benefiting the grantees.

Taking the facts as they stand, effect must be given to the deed; but leave will be given to file a bill to impeach it, if a desire so to do be stated to us within a fortnight.⁶

GRANT v. GRANT.

IN CHANCERY, BEFORE SIR JOHN ROMILLY, M. R., JULY 7, 8, 10, 1865.

[*Reported in 34 Beavan, 623.*]

THE testator, Mr. Grant, married Miss Bayley in 1857, and he died in 1863. He made his brother, the defendant, his executor, and gave him the residue of his property.

The widow of the testator claimed, as gifts to her from her husband, several chattels which were at the testator's residence at Nuttall Hall at his decease. These consisted of two statuettes of "Highland Mary" and "Lavinia," and two pedestals belonging to them, a piano, a soufflé and hash dish, a Bohemian glass dessert service, a marble dessert service, a copy of "The Madonna della Sedia," and four engravings, namely, "Midsummer Night's Dream," "Miss Nightingale at Scutari," "The Rescue," and "The Sanctuary."

By this suit, the widow sought to have a declaration of her right to these articles, and to have them delivered up to her by the defendant.

Mr. Hobhouse and *Mr. W. W. Karlake*, for the plaintiff, cited *Lucas v. Lucas*, *Northey v. Northey*,⁷ *Graham v. Londonderry*, *Mews v. Mews*,⁸ *Tipping v. Tipping*,⁹ *Jervoise v. Jervoise*.¹⁰

Mr. Selwyn and *Mr. Kay*, for the defendant, cited *M'Lean v. Longlands*,¹¹ *Walter v. Hodge*; ¹² and as to costs, *Governesses' Benevolent Institution v. Rusbridger*.¹³

¹ Kay, 711.

² 1 P. Wms. 577.

³ Prec. Ch. 182.

⁴ Amb. 264.

⁵ 2 Jac. & W. 565.

⁶ *Paterson v. Murphy*, 11 Hare, 88; *Donaldson v. Donaldson*, Kay, 711; *Smith v. Darby*, 39 Md. 268, *accord.* — Ed.

⁷ 2 Atk. 77.

⁸ 15 Beav. 529.

⁹ 1 P. Wms. 729.

¹⁰ 17 Beav. 566.

¹¹ 5 Ves. 71.

¹² 2 Swan. 92.

¹³ 18 Beav. 467.

THE MASTER OF THE ROLLS. In this case, after reading the evidence, I have come to the conclusion that the plaintiff is entitled to a decree.

It has been very properly observed, on both sides, that, in cases of this description, the question in equity is merely one of evidence, and that it cannot now be disputed that a husband may be a trustee for his wife. That is perfectly settled, and the only question is, whether he has constituted himself such a trustee or not. I apprehend that the fact of the transaction taking place between the husband and the wife, instead of between strangers, makes no difference in this respect, further than this, — that in the case of a gift of chattels by one stranger to another, there must be a delivery of the chattels in order to make the gift complete; whereas, in the case of husband and wife there cannot be a delivery, because, assuming they are given to the wife, they still remain in the legal possession of the husband, and therefore it is impossible to give that completion to the gift that would be necessary to give effect to it between strangers. Therefore this comes under that class of cases in which it has been held that, though there is not an absolute delivery, a declaration of trust is sufficient.

The question here is, whether the husband has used words which are equivalent to a declaration of trust. In the first place, these words need not be in writing; that is quite settled by the authorities. They must be clear, unequivocal, and irrevocable; but it is not necessary to use any technical words, — it is not necessary to say, “I hold the property in trust for you,” nor is it necessary to say, “I hold the same for your separate use.” Any words that show that the donor means, at the time he speaks, to divest himself of all beneficial interest in the property are, in my opinion, sufficient for the purpose of creating the trust. I think it is also sufficient, for the purpose of showing that the trust has been created, if he afterwards states that he has so created the trust, though there was no witness except the donee present at the time the trust was created. For instance, if A. who has £1,000 consols standing in his name, in the presence of witnesses or in writing (it does not matter which), says to B., “I hereby give you £1,000 consols now standing in my name in the books of the governor and company of the Bank of England,” in my opinion that would create A. a trustee for B., and the gift would be complete. I think that is what is established in *Ex parte* Pye, on which I have had to comment very often in many other cases. I am of opinion that it would be just the same if A. were asked by C., “Have you given the stock standing in your name to B.?” and A. said in reply, “Yes, I have given it to B., and it is his property.” I am also of opinion that if, without being asked, he had voluntarily said, “I have given the £1,000 consols

standing in my name in the books of the governor and company of the Bank of England to B.," that would constitute a valid declaration of trust of the stock though it still remained in the name of A.

I have said it must be final, irrevocable, and complete; it will not do to speak of the property as belonging to another person, because that is ambiguous. That may be evidence corroborative of something else, and very often is; but the mere fact of calling stock or a chattel by the name of B., saying, "that is B.'s statue or B.'s carriage or B.'s stock," does not necessarily make it the property of that person. Neither does an express declaration that "I intend to give it," or that "I mean to give it," because the thing is not complete. But if the donor makes an express declaration that "I do now give it," I am of opinion that is sufficient. I am also of opinion that it is sufficient if he makes a declaration, "I have already given it." Then the only matter that is necessary to be known is, does the donor mean, by those words, to divest himself of the whole of the property in question?

I asked the question, what does a husband mean when he says to his wife, "I give you this vase or this chandelier," does he mean to say that he keeps any property in it for himself? If so, he means that which the words do not import, when he says expressly, "I give it you." There may be, in some cases, an implied condition between husband and wife, that he is to be at liberty to make use of the thing given when he requires it during his life; but even that implied condition does not exist unless it is expressed or is understood by both parties at the time. That might be so, but it would depend upon the nature of the property.

In all these cases the difficulty is, whether the evidence establishes the fact; that is the real question to be considered. In the first place, there is a rule constantly acted on in chambers in equity, that the unsupported testimony of any person, on his own behalf, cannot be safely acted on. If it were otherwise, any stranger might come and swear that any testator owed him a sum of money; but that is not sufficient proof; the question would be asked, Is there any writing, or other proof of the debt? Without that, this court does not listen to the declaration of the claimant, and is obliged in all cases to disregard it; and though, in many cases, it may prevent a person from receiving what he is justly entitled to, still the court cannot act on the mere unsupported testimony of a claimant.

In this case, I could not act on the uncorroborated testimony of the wife, the alleged donee; but in my opinion there is evidence to support her testimony, and even to prove the case without it. I admit that a mere intention to give would not be conclusive, and that it must be shown that the property has really been given. I will refer to the various passages in the evidence, which, in my opinion, establish that

this property is the widow's; and I will then refer to the two cases of *Mews v. Mews*¹ and *Walter v. Hodge*,² to show how easily they are distinguishable from the present case.

I will first refer to the statuettes, and I find that the wife swears that they were given to her; this alone would not do, but Ellen Lafon says this: "I paid a visit to Nuttall Hall, in September, 1862, when Mr. Grant took me through the reception rooms and showed me everything in them, particularly pointing out to me his presents to Mrs. Grant on her marriage, namely, the beautiful statuettes of 'Highland Mary' and 'Lavinia,' which he distinctly told me he had given to her."

Why am I to doubt this lady, who says that Mr. Grant told her that he had given them to his wife? If he did, then he had created himself a trustee for her. That is still more strongly confirmed by Mr. Spence, the sculptor, who says that they were ordered for her, and that Mr. Grant stated to him that he intended to give them to her as a wedding present. That of itself would not be conclusive; but when the donor himself, speaking of these two statuettes, tells a lady, voluntarily, and of his own accord, "I have given them to her," and the sculptor says, they were ordered for her and intended as a marriage present for her, then the matter is, in my opinion, established. There is the further corroborative testimony of the plaintiff's sister, but I prefer this independent testimony.

That puts an end entirely to an observation made by Mr. Selwyn, which I think can scarcely be supported in law, that, if a man makes a wedding present to the woman to whom he is engaged, the fact of marriage revests the gift in him, and he becomes entitled to it himself. It is not necessary to refer to that, because it is clear the statuettes did not arrive until after the marriage, and, therefore, they could not, actually, have been given until after the marriage.

There is not the same clearness with respect to the two marble pedestals; but it is quite clear that they must go with the statuettes. Mr. Grundy, the sculptor, says, Mr. Grant requested me to make, and I accordingly made, a pair of antique pedestals for the statuettes. I remember Mr. Grant saying to me that he had seen the statuettes in Mr. Spence's studio, at Rome; and that he had told Mr. Spence that, if Mrs. Grant liked them, he would buy them for her, and that he had accordingly done so. I am of opinion that this addition to the statuettes must be treated as an addition to the original gift, and must pass with the original gift.

The next thing which I have to refer to is the piano. As to this, Ellen Lafon says, "The piano which he told me he had given to her on condition that she would play in the presence of other persons beside himself, which condition she had complied with." That, again, is an express statement made by him, that he had given it to his wife.

The hash-dish and soufflé-dish rest on still stronger evidence; for, in the first place, Helen Flora Bayley says, "I first saw the hash-dish (or breakfast dish) in the autumn of 1862, on the breakfast table at Nuttall, and my brother-in-law told me that he had given it to his wife for her own, and that he was going to have it altered for her, as the spirit-lamp, which burned below it, was too high. At the same time, he said that he had given my sister a soufflé-dish, but she had only used it once." In my opinion, that is also an express declaration of trust; for, as I before said, no technical words are necessary, and here he stated that he had divested himself of the whole of the property in them. But the evidence is still more strong, and goes a great deal further, when you come to the evidence of the butler, who, in my opinion, not only proves that these two pieces of plate, but that the Bohemian glass service and the marble dessert service also belong to the plaintiff. He says, "I perfectly well remember the soufflé-dish and hash-dish; they were under my charge as butler. Mr. Grant told me, before they arrived at Nuttall, that he had bought them of Mr. Harry Emmanuel, for his wife; and after he came to Nuttall he told me to take charge of them, and that they were his wife's; and, although they were kept, for convenience' sake, with the other plate, I always considered them as belonging to Mrs. Grant. They were engraved with Mr. Grant's crest, but, to the best of my recollection, they were not engraved with his initials. I also remember the Bohemian glass dessert service, and the marble dessert service: they were under my care. Mr. Grant himself told me that he had given them to his wife. I very well remember Mr. Grant saying to me, the day before he left Nuttall for the last time, speaking of the marble statuettes and the marble dessert service, 'Take care of them, Pearson, for they are your mistress's.'"

With respect to the two pieces of plate, the Bohemian glass service and the marble dessert service, the donor, if it were necessary, has really created Thomas Pearson, the butler, a trustee for her of this property. There is an express declaration that they were hers, and it meets exactly the case which I stated in *Mews v. Mews*, where I observed, that if the husband had stated to the banker that the money was his wife's, that would probably have been sufficient. Here he does expressly state to another person that they are his wife's. In addition to that, he puts them in his charge, and tells him to take care of them for his wife. It is scarcely necessary to go further.

With respect to the picture of the "Madonna della Sedia," the butler says, "Mr. Grant himself told me that it was his wife's, that he had given it to her." This is repeated by the witness, Mr. John William Maclure.

With respect to the two pictures, "The Midsummer Night's Dream" and "Miss Nightingale at Scutari," Miss Louisa Plummer says she

saw Mr. Grant give to his wife the engraving of "Miss Nightingale at Scutari," as a present, and Margaret Elizabeth Poole says, "I recollect hearing Robert Dalglish Grant say that the engravings of 'Midsummer Night's Dream' and 'Miss Nightingale at Scutari' were birthday presents from him to his wife. I was always under the impression that the engravings of 'The Rescue' and 'The Sanctuary' were birthday presents from Mr. Grant to his wife." I do not find the same confirmation as to these two pictures of "The Rescue" and "The Sanctuary;" but, considering that the wife's testimony in all other respects is so entirely supported by such abundant evidence, and that she swears positively to that gift, and that the others state that they were treated as presents of his, though those two are not confirmed, I shall trust to the evidence of the wife in that respect, and treat the whole of these four pictures as gifts to her. If these two had stood alone, and that had been the whole question, it would have been perfectly different; but, considering that, with respect to the statuettes, the marble pedestals, the two pieces of plate, the piano, the Bohemian glass service, the marble dessert service, the picture of the "Madonna," and two of the engravings, her testimony is so amply and so entirely confirmed, I shall trust her word with respect to the other two pictures, and give the whole of those to her. I will make a decree accordingly.

I wish to make an observation on the two cases cited. In *Mews v. Mews*,¹ it is clear that why I considered the matter was not proved was this: All that happened there was, that the money was allowed to be in the name of his wife at his bankers', but she never stated that he had given it to her. He knew of it perfectly, he sanctioned it, and she was in the habit of drawing upon it; but, upon his death-bed, he treated it as his own, and thereby contradicted the evidence of his wife in respect of it. I then made this observation: "The evidence which is required to constitute a valid gift, as I have before stated, is, that there must be some clear and distinct act by which the husband has divested himself of the property, and engaged to hold it as a trustee for the separate use of his wife. I have looked in vain through the evidence to find any such clear and distinct act on his part. If he had himself deposited the money with bankers, or with those gentlemen as *quasi* bankers, stating that they were to hold it for his wife, that would probably have been sufficient for that purpose."

Here, I am of opinion that there are distinct and unequivocal expressions, and that, unless technical words are required, nothing more can be required than for a man to say, "I have given it to my wife, I have divested myself of all interest in it; it is hers and hers only;" and any words that are equivalent to that are sufficient for the purpose.

¹ 15 Beav. 533.

In *Walter v. Hodge*,¹ the wife said that her husband had given her a pocket-book, containing, I think, £300 worth of bank-notes. If it stood on that alone, as I have already stated, the court could not proceed on the unsupported testimony of the wife, though that would be sufficient if confirmed. She brought a lady, a friend of hers, who was present, to confirm it; but the lady's confirmation was this: "I give it to you in case any accident should happen to me," which is a very different thing from a gift; and if a gift at all, it was a *donatio mortis causa*. So that, in point of fact, there was no evidence in that case to support the gift. If the evidence of the gift had been confirmed by the other witness, I am of opinion that the case would have been made out.

I am of opinion that it is made out here, and the necessary consequences must follow.²

RICHARDSON v. RICHARDSON.

IN CHANCERY, BEFORE SIR W. PAGE WOOD, V. C., FEBRUARY 15, 1867.

[Reported in *Law Reports*, 3 *Equity*, 686.]

THIS bill was filed by Joseph Richardson, a legatee of £1,250, under the will (dated the 1st of March, 1864) of his brother, Richard Richardson, who died on the 14th of April, 1864, against John Richardson, John Severs, and Richard Mills, the executors of the will, praying for payment of the legacy and interest.

The defendants, the executors, claimed a set-off against the legacy of a sum of £450, with interest at £5 per cent (upon £200, part of the sum, from the 26th of June, 1845, and upon £250, the residue, from the 23d of September, 1851), in respect of two promissory notes of

¹ 2 Swanst. 92.

² *Wallingsford v. Allen*, 10 Pet. 583, 594 (*semble*); *Williams v. Maull*, 20 Ala. 721; *Eddins v. Buck*, 23 Ark. 507; *Deming v. Williams*, 26 Conn. 226; *Jennings v. Davis*, 31 Conn. 134 (*semble*); *Long v. White*, 5 J. J. Marsh. 226, 229 (*semble*); *Adams v. Brackett*, 5 Met. 280, 285 (*semble*); *Whitten v. Whitten*, 3 Cush. 191, 199 (*semble*); (but see *Spelman v. Aldrich*, 126 Mass. 113;) *Ratliffe v. Dougherty*, 24 Miss. 181; *Wells v. Treadwell*, 28 Miss. 717; *Skillman v. Skillman*, 2 Beasley, 403 (*semble*); *Neufville v. Thomson*, 3 Edw. Ch. 92 (*semble*); *Reed v. Reed*, 52 N. Y. 651; *Shuttleworth v. Winter*, 55 N. Y. 624 (*semble*); *Paschall v. Hall*, 5 Jones, Eq. (N. C.) 108 (*semble*); *McKenna v. Phillips*, 6 Whart. 571; *Herr's Appeal*, 5 Watts & S. 494; *Elms v. Hughes*, 3 Dessaus. 155; *Bradshaw v. Mayfield*, 18 Tex. 21 (*semble*); *Cardell v. Ryder*, 35 Vt. 47, *accord*.

Moore v. Moore, L. R. 18 Eq. 474; *Wade v. Fisher*, 9 Rich. Eq. 362 (*semble*), *contra*.

Conf. McLean v. Longlands, 5 Ves. 71; *Walter v. Hodge*, 2 Swanst. 92. — ED.

the above dates respectively, given by the plaintiff to his sister, Elizabeth Richardson, to secure £200 and £250 respectively, advanced by her to the plaintiff.

By a voluntary deed, dated the 17th of April, 1858, and made between Elizabeth Richardson of the one part and the testator of the other part, Elizabeth Richardson granted, conveyed, and assigned to the testator, his heirs, executors, administrators, and assigns, certain hereditaments held by her on mortgage, and also the mortgage debts and interest, and “all other the personal estate and effects whatsoever and wheresoever of her, the said Elizabeth Richardson,” and all the estate, &c. ; to hold the said hereditaments thereinbefore conveyed to and to the use of R. Richardson, his heirs and assigns forever, subject to such right of equity and redemption as the same were then subject to ; and to have, hold, receive, take, and enjoy the said several principal mortgage debts and interest, personal estate, effects, and premises thereinbefore assigned unto the said R. Richardson, his executors, administrators, and assigns, to and for his and their own absolute use and benefit. And Elizabeth Richardson thereby constituted and appointed Richard Richardson, his executors, administrators, and assigns, her true and lawful attorney and attorneys in her and their name or names, but for the sole and absolute benefit of Richard Richardson, to ask and demand, sue for, recover, and receive, and to give good and effectual receipts and discharges for the thereby assigned moneys and premises, and every or any part thereof, and generally for Richard Richardson, his executors and administrators, to make, do, and execute all such other acts, deeds, matters, and things as should be deemed necessary for deriving the full benefit of the assignment thereinbefore contained ; and Elizabeth Richardson thereby covenanted that she, her heirs, executors, and administrators, would, from time to time and at all times thereafter, upon every reasonable request, at the costs and charges of Richard Richardson, his heirs, executors, administrators, and assigns, make, do, and execute, and perfect, or cause and procure to be made, done, and executed, and perfected, all and every such further and other lawful and reasonable acts, deeds, conveyances, assignments, and assurances in the law whatsoever for the more effectually conveying and assigning or otherwise confirming the hereditaments, moneys, personal estate, and premises unto and to the use of Richard Richardson, his heirs, executors, administrators, and assigns, in manner aforesaid, as by him or them, or his or their counsel in the law, should be reasonably advised or required.

Elizabeth Richardson died on the 21st of April, 1858 ; and, after the testator's death, the notes in question were found amongst his papers, though not indorsed to any one.

The defendants' contention was, that the notes passed by the deed

of assignment to the testator, and became part of his assets; so that, whether the right to sue upon them was or was not barred, there was a right to set them off against the legacy.

Mr. G. M. Giffard, Q. C., and *Mr. Kay*, Q. C., for the plaintiff. The questions are three: First, whether the notes passed to the testator by the voluntary deed.¹

On the first point, we say that the deed did not pass the notes, there having been no indorsement. However *Kekewich v. Manning* may have gone, it has never yet been held that a voluntary deed of gift will, in the view of this court, be held to pass a chose in action which is incapable of being passed by deed at common law. In this case, delivery of the notes would at least be necessary; but that is not proved. *Edwards v. Jones*, before Lord Cottenham, remains untouched by *Kekewich v. Manning*. *Gilbert v. Overton*.

If the notes did not pass by the deed, the testator could claim them only as executor of Elizabeth, and he did not take out probate. Even if the executors should take out probate, they will take only subject to the payment of Elizabeth's debts and testamentary expenses. The executors cannot set off a legacy under the testator's will against a derived claim which his estate may have against the legatee. *Freeman v. Lomas*.²

Mr. Willcock, Q. C., and *Mr. Faber*, for the defendants. The language of the deed is quite sufficient to pass what is capable of being passed as a chose in action. No doubt the mode of transfer at law is by indorsement; but where there is an assignment accompanied by a power of attorney, and followed by a covenant for further assurance, indorsement is unnecessary.

This deed, moreover, was an appointment coupled with an interest, and was irrevocable.

A promissory note, though unindorsed, may be the subject of a *donatio mortis causa*. *Veal v. Veal*.³

It is said that delivery cannot be proved. But a power of attorney is as good as delivery.

Fortescue v. Barnett, which is approved in *Kekewich v. Manning*, is an authority for the proposition that a voluntary assignment of a bond, where the bond is not delivered, but kept in the possession of the assignor, will constitute the assignor, in this court, a debtor to the assignee.

Mr. Giffard, in reply. It has been said that the deed of April, 1858, was irrevocable; but it would be a monstrous thing to say that, because you once constitute your clerk or solicitor your agent to receive money, you cannot revoke the appointment. It has been said that the appoint-

¹ Only so much of the case is given as relates to this question. — Ed.

² 9 Hare, 109.

³ 27 Beav. 303.

ment was coupled with an interest. But that is begging the whole question. No interest passed at law. All Elizabeth Richardson could have done would have been to sue in Richard's name for the debt; and that would not have interfered with her power of revocation. If there was no intention to pass these notes, then *cadit quæstio*; if there was an intention, then an immediate transfer was intended, which was never effected. The power of attorney does not extend to the executors of Elizabeth; and Richard Richardson himself never took out probate of Elizabeth's will, or took any steps to perfect his title. He never showed that he considered himself entitled to this property as his own.

The set-off cannot be established, on two grounds: one, that in point of fact these notes are the assets of Elizabeth, and did not pass by the deed; secondly, that the deed only passed such an interest in Elizabeth's personal estate as would remain after payment of her debts, funeral, and testamentary expenses.

[Searle v. Law¹ was also cited.]

Feb. 26. SIR W. PAGE WOOD, V. C. The sole question in this case is, whether a legatee, under the will of the testator, Richard Richardson, of a sum of £1,250, ought or ought not to submit to a deduction of £450, in respect of two promissory notes given by him to his sister, which involves the further question, whether the testator was or was not the absolute owner of the notes. If he was the owner, though he demanded no interest upon the notes, and made no application for payment of them, yet, as is conceded, the Statute of Limitations cannot be set up; and the plaintiff must be considered as having received, on account of his legacy, so much of the assets of the testator as his debt amounted to.

Whether or not the notes were the property of the testator, depends upon a certain voluntary assignment, whereby the sister, shortly before her death, assigned the whole of her personal estate to her brother, the testator; and in the same instrument she gave him a power of attorney to ask, sue for, and recover the thereby assigned moneys and premises, and to do and execute such further acts and deeds as should be deemed necessary for deriving the full benefit of the assignment.

Now, there is no specific description in the deed of the promissory notes; and, if they passed at all, they passed under the description of "all other the personal estate and effects, whatsoever and wheresoever," of Elizabeth Richardson. She did not indorse the notes; and the defendants, the executors, by their answer, say they believe that, if she had not died so soon, the testator would have applied to her to indorse the notes, but she did not do so. The questions are: first, whether

they passed by the deed at all ; and, secondly, if they passed, whether they passed to the testator as trustee, or in his own right.

After the decision in *Kekewich v. Manning*, I think it is impossible to contend that these notes did not pass by this instrument, because the rule laid down in that case, the decision in which was supported by reference to *Ex parte Pye*, was not confined merely to this, that a person who, being entitled to a reversionary interest, or to stock standing in another's name, assigns it by a voluntary deed, thereby passes it, notwithstanding that he does not in formal terms declare himself to be trustee of the property ; but it amounts to this, that an instrument executed as a present and complete assignment (not being a mere covenant to assign on a future day) is equivalent to a declaration of trust.

It is impossible to read the argument in that case, and the judgment of Lord Justice Knight Bruce, without seeing that his mind was directed to *Meek v. Kettlewell*, and that class of cases, where it had been held (such was the nicety upon which the decisions turned) that an actual assignment is nothing more than an agreement to assign in equity, because it merely passes such equitable interest as the assignor may have ; and some further step must be taken by the assignee to acquire the legal interest. That further step being necessary, the assignment was held to be in truth nothing but an agreement to assign, and, being so, was not enforceable in this court, — the court having often decided that it will not enforce a mere voluntary agreement.

The distinction, undoubtedly, was very fine between that and a declaration of trust ; and the good sense of the decision in *Kekewich v. Manning*, I think, lies in this, that the real distinction should be made between an agreement to do something when called upon, something distinctly expressed to be future in the instrument, and an instrument which affects to pass everything, independently of the legal estate. It was held in *Kekewich v. Manning* that such an instrument operates as an out-and-out assignment, disposing of the whole of the assignor's equitable interest, and that such a declaration of trust is as good a form as any that can be devised. The expression used by the Lords Justices is this : “ A declaration of trust is not confined to any express form of words, but may be indicated by the character of the instrument.”

In that case, reference was made in the argument principally to the case of *Ex parte Pye*, which was a decision of Lord Eldon to the same effect. Reliance is often placed on the circumstance that the assignor has done all he can, — that there is nothing remaining for him to do ; and it is contended that he must, in that case only, be taken to have made a complete and effectual assignment. But that is not the sound

doctrine on which the case rests ; for, if there be an actual declaration of trust, although the assignor has not done all that he could do, — for example, although he has not given notice to the assignee, — yet the interest is held to have effectually passed as between the donor and donee. The difference must be rested simply on this : aye or no, has he constituted himself a trustee ?

In *Ex parte Pye*, the testator had written to one Dubost, authorizing him to purchase in France an annuity for the benefit of a lady named Garos, for her life, with power to draw on him for £1,500 for such purchase. The agent, finding the lady was a married woman, exercised his own discretion, and bought the annuity in the name of the testator. Then, shortly before his death, the testator sent to Dubost, by his desire, a power of attorney authorizing him to transfer the annuity to the lady. The testator died before anything more was done ; and, after his death, the annuity was transferred. There was a question whether, by the law of France, the exercise of a power of attorney by the person to whom it is given, without knowledge of the death of his principal, is good. I think the Master found that it was so ; but Lord Eldon expressly declined to rely upon that, as he says in his judgment : “ These petitions ” (the question came on upon petition) “ call for the decision of points of more importance and difficulty than I should wish to decide in this way, if the case was not pressed upon the court. With regard to the French annuity, the Master has stated his opinion as to the French law, — perhaps without sufficient authority, or sufficient inquiry into the effect of it, — as applicable to the precise circumstances of this case ; but it is not necessary to pursue that, as upon the documents before me it does appear that, though in one sense this may be represented as the testator’s personal estate, yet he has committed to writing what seems to me a sufficient declaration that he held this part of the estate in trust for the annuitant.”

Now, the testator had done nothing more than execute the power of attorney. It is true, he had written a letter directing the stock to be purchased in the lady’s name ; but that was not done : it was purchased in his name. The decision, therefore, could only be rested upon this, that this was not an agreement to assign, not an agreement to become a trustee at some future period, but an actual constitution by the testator of himself as trustee.

Following, therefore, *Kekewich v. Manning*, I must regard this instrument as having effectually assigned the promissory notes, although they were not indorsed. The instrument is an actual assignment, with a power immediately vested in the assignee to make himself master of the property ; and I do not know in what way the assignor could have more effectually declared that she was a trustee of that property for Richard Richardson.

The order will be to pay the plaintiff his legacy of £1,250 less £450, with interest at £4 per cent on the difference, from one year after the testator's death. There will be no costs on either side, except that the defendants will have their costs out of the estate.

MORGAN v. MALLESON.

IN CHANCERY BEFORE SIR JOHN ROMILLY, M. R., JULY 26, 28, 1870.

[*Reported in Law Reports, 10 Equity, 475.*]

THE following memorandum was given by John Saunders, the testator in the cause, to his medical attendant, Dr. Morris:—

“I hereby give and make over to Dr. Morris an India bond, No. D., 506, value £1,000, as some token for all his very kind attention to me during illness.

“Witness my hand, this 1st day of August, 1868.

(Signed)

“JOHN SAUNDERS.”

The signature was attested by two witnesses, and the memorandum was handed over to Dr. Morris, but the bond, which was transferable by delivery, remained in the possession of Saunders. There was no consideration for it.

Saunders died more than a year afterwards, having by his will bequeathed the residue of his personal estate to charities. A suit was instituted for the administration of his estate, and a summons was taken out by the Attorney-General on behalf of absent charities for the direction of the court on the question whether this memorandum was or was not a valid declaration of trust in favor of Dr. Morris.

Mr. Wickens, for the Attorney-General, contended, on behalf of the absent charities, that this memorandum, which was a document of an informal nature given by Saunders to his medical attendant, and without consideration, could not be taken to be an assignment or a declaration of trust when there had been no delivery of the bond. *Ex parte* Pye; *Meek v. Kettlewell*; *Dillon v. Coppin*; ¹ *Antrobus v. Smith*; ² *Edwards v. Jones*.

Mr. Jessel, Q. C., and *Mr. Speed*, for Dr. Morris, contended that the memorandum was a good declaration of trust, and that Dr. Morris was entitled to the bond. *Kekewich v. Manning*; *Richardson v. Richardson*; *Parnell v. Hingston*.³

July 28. LORD ROMILLY, M. R. I am of opinion that the paper-writing signed by Saunders is equivalent to a declaration of trust in

¹ 4 My. & Cr. 647.

² 12 Ves. 39.

³ 3 Sm. & Giff. 337.

favor of Dr. Morris. If he had said, "I undertake to hold the bond for you," or if he had said, "I hereby give and make over the bond in the hands of A," that would have been a declaration of trust, though there had been no delivery. This amounts to the same thing; and Dr. Morris is entitled to the bond, and to all interest accrued due thereon.¹

ARMSTRONG v. TIMPERON.

IN CHANCERY, BEFORE SIR JOHN STUART, V. C., JANUARY 17, 1871.

[*Reported in Weekly Notes* [1871], 4.]

THOMAS RIGG made his will, dated the 12th of April, 1861, by which he gave certain legacies, and appointed his brother, Robert Rigg, and his nephews, executors.

On the 3d of June, 1867, the testator in the cause signed a memorandum in the words following:—

"CARLISLE, June 3, 1865.

"I, Thomas Rigg, of Rockcliffe, now, in the presence of J. Davidson, do authorize my brother, R. Rigg, to claim as his own after my death the sum of £150 out of the money now lying in the bank at Carlisle for the service rendered me during my lifetime.

"As witness my hand,

T. RIGG."

The testator died on the 11th of August, 1865, and the executor, Robert Rigg, retained the amount of £150. On the 10th of July, 1868, a bill was filed to administer the testator's estate, in which a decree and a certificate were made. The chief clerk disallowed the £150 retained by the executor. A summons was taken out to vary the certificate in this respect.

Dickinson, Q. C., and *G. W. Mounsey*, for the summons.

Greene, Q. C., and *Langworthy*, supported the certificate.

¹ *Bunn v. Winthrop*, 1 Johns. Ch. 329, *accord*.

Bridge v. Bridge, 16 Beav. 315, 326, 327; *Trimmer v. Danby*, 25 L. J. Ch. 424; *Young v. Young* (N. Y. Ct. App., April, 1880), 21 Alb. L. J. 395, *contra*.

In *Warriner v. Rogers*, L. R. 16 Eq. 340, Bacon, V. C., said, p. 348: "If it were necessary, but I do not think it is, to go further into the case of *Morgan v. Malleon*, I should require to examine it and consider the facts much more closely than I now think it necessary to do in order to determine what the real bearing of that case is. I am strongly inclined to believe that there must be some imperfection in the report of it, because what staggers me most is to find that the decision, as it stands, would seem to establish that if a man writes a letter to say, 'I have given' a bank-note, or an Indian bond, or anything else, 'to A. B.,' and no more, and retains the bank-note or bond and the memorandum in his own possession, that letter has a valid operation as between himself and A. B. If that were all that appeared in the case, I should certainly consider such a letter to be a mere nullity."—ED.

THE VICE-CHANCELLOR said that there was a clear declaration of trust, and it was no objection that the document remained in the testator's possession. There must be a declaration to that effect.¹

RICHARDS v. DELBRIDGE.

IN CHANCERY, BEFORE SIR G. JESSEL, M. R., APRIL 16, 1874.

[*Reported in Law Reports, 18 Equity, 11.*]

DEMURRER. The bill, filed by Edward Bennetto Richards, an infant, by his next friend, stated that John Delbridge, deceased, was possessed of a mill, with the plant, machinery, and stock in trade thereto belonging, in which he carried on the business of a bone manure merchant, and which was held under a lease dated the 24th of June, 1863.

That on the 7th of March, 1873, John Delbridge indorsed upon the lease and signed the following memorandum:—

“7th March, 1873. This deed and all thereto belonging I give to Edward Bennetto Richards from this time forth, with all the stock in trade.

“JOHN DELBRIDGE.”

That the plaintiff was the person named in the memorandum, and the grandson of John Delbridge, and had then for some time assisted him in the business; that John Delbridge, shortly after signing the memorandum, delivered the lease on his behalf to Elizabeth Ann Richards, the plaintiff's mother, who was still in possession thereof.

That John Delbridge died in April, 1873, having executed several testamentary instruments which did not refer specifically to the said mill and premises, but gave his furniture and effects, after his wife's death, to be divided among his family.

That the testator's widow, Elizabeth Richards, took out administration to his estate, with the testamentary papers annexed.

The bill, which was filed against the defendants, Elizabeth Delbridge, Elizabeth Ann Richards, and the testator's two sons, who claimed under the said testamentary instruments, prayed a declaration that the indorsement upon the lease by John Delbridge and the delivery of the lease to Elizabeth Ann Richards created a valid trust in favor of the plaintiff of the lease and of the estate and interest of John Delbridge in the property therein comprised, and in the good-will of the business carried on there, and in the implements and stock in trade belonging to the business.

The defendants demurred to the bill for want of equity.

¹ *Thorpe v. Owen*, 5 Beav. 224; *Smith v. Darby*, 39 Md. 268, *accord.* — Ed.

Mr. Fry, Q. C., and *Mr. Phear*, in support of the demurrer.¹

Mr. W. R. Fisher (*Mr. Southgate*, Q. C., with him), for the plaintiff.

SIR G. JESSEL, M. R. This bill is warranted by the decisions in *Richardson v. Richardson* and *Morgan v. Malleson*; but, on the other hand, we have the case of *Milroy v. Lord*, before the Court of Appeal, and the more recent case of *Warriner v. Rogers*,² in which Vice-Chancellor Bacon said: "The rule of law upon this subject I take to be very clear, and with the exception of two cases which have been referred to" (*Richardson v. Richardson* and *Morgan v. Malleson*), "the decisions are all perfectly consistent with that rule. The one thing necessary to give validity to a declaration of trust — the indispensable thing — I take to be, that the donor, or grantor, or whatever he may be called, should have absolutely parted with that interest which had been his up to the time of the declaration, should have effectually changed his right in that respect, and put the property out of his power, at least in the way of interest."

The two first-mentioned cases are wholly opposed to the two last. That being so, I am not at liberty to decide the case otherwise than in accordance with the decision of the Court of Appeal. It is true the judges appear to have taken different views of the construction of certain expressions, but I am not bound by another judge's view of the construction of particular words; and there is no case in which a different principle is stated from that laid down by the Court of Appeal. Moreover, if it were my duty to decide the matter for the first time, I should lay down the law in the same way.

The principle is a very simple one. A man may transfer his property, without valuable consideration, in one of two ways: he may either do such acts as amount in law to a conveyance or assignment of the property, and thus completely divest himself of the legal ownership, in which case the person who by those acts acquires the property takes it beneficially, or on trust, as the case may be; or the legal owner of the property may, by one or other of the modes recognized as amounting to a valid declaration of trust, constitute himself a trustee, and, without an actual transfer of the legal title, may so deal with the property as to deprive himself of its beneficial ownership, and declare that he will hold it from that time forward on trust for the other person. It is true he need not use the words, "I declare myself a trustee," but he must do something which is equivalent to it, and use expressions which have that meaning; for, however anxious the court may be to carry out a man's intention, it is not at liberty to construe words otherwise than according to their proper meaning.

The cases in which the question has arisen are nearly all cases in

¹ The arguments of counsel have been omitted. — Ed.

² Law Rep. 16 Eq. 340, 348.

which a man, by documents insufficient to pass a legal interest, has said, "I give or grant certain property to A. B." Thus, in *Morgan v. Malleson* the words were, "I hereby give and make over to Dr. Morris an India bond;" and in *Richardson v. Richardson* the words were, "grant, convey, and assign." In both cases the judges held that the words were effectual declarations of trust. In the former case, Lord Romilly considered that the words were the same as these: "I undertake to hold the bond for you;" which would undoubtedly have amounted to a declaration of trust.

The true distinction appears to me to be plain, and beyond dispute; for a man to make himself a trustee, there must be an expression of intention to become a trustee, whereas words of present gift show an intention to give over property to another, and not retain it in the donor's own hands for any purpose, fiduciary or otherwise.

In *Milroy v. Lord*, Lord Justice Turner, after referring to the two modes of making a voluntary settlement valid and effectual, adds these words: "The cases, I think, go further, to this extent, that if the settlement is intended to be effectuated by one of the modes to which I have referred, the court will not give effect to it by applying another of those modes. If it is intended to take effect by transfer, the court will not hold the intended transfer to operate as a declaration of trust, for then every imperfect instrument would be made effectual by being converted into a perfect trust."

It appears to me that that sentence contains the whole law on the subject. If the decisions of Lord Romilly and of Vice-Chancellor Wood were right, there never could be a case where an expression of a present gift would not amount to an effectual declaration of trust, which would be carrying the doctrine on that subject too far. It appears to me that these cases of voluntary gifts should not be confounded with another class of cases in which words of present transfer for valuable consideration are held to be evidence of a contract which the court will enforce. Applying that reasoning to cases of this kind, you only make the imperfect instrument evidence of a contract of a voluntary nature which this court will not enforce; so that, following out the principle even of those cases, you come to the same conclusion.

I must, therefore, allow the demurrer, and, though I feel some hesitation, owing to the conflict of the authorities, I think the costs must follow the result.¹

¹ *Bridge v. Bridge*, 16 Beav. 315; *Warriner v. Warriner*, L. R. 16 Eq. 340, per Bacon, V. C. (*semble*), *accord*. — ED.

In re CAPLEN'S ESTATE; BULBECK *v.* SILVESTER.

IN THE HIGH COURT OF JUSTICE, CHANCERY DIVISION, BEFORE SIR
GEORGE JESSEL, M. R., JANUARY 29, 1876.

[*Reported in 45 Law Journal Reports*, 280.]

THE testatrix, Ann Caplen, in June, 1865, lent the sum of £300 to her niece's husband, Morris Stening, on the security of his promissory note for £300 and interest, payable on demand. She received the interest during the rest of her life, and made no demand for payment of the note. Ann Caplen died on the 30th of May, 1875, and after her death the note was found uncanceled among her papers by her executors, George Silvester and John Walls, who demanded payment. It was then alleged, on the part of Gainor Bulbeck, Ann Caplen's sister, that about September, 1872, Ann Caplen told Morris Stening she wanted him to hold the £300 for the benefit of Gainor Bulbeck and her daughters, Mrs. Stening, Mrs. Edwards, and Mrs. Harvey; and directed him after her own death to pay the interest to Gainor Bulbeck during her life, and to divide the principal sum among her said daughters after her decease.

The case was verified by the affidavit of Morris Stening, and Gainor Bulbeck and her daughters deposed that Ann Caplen had in similar terms communicated to them her intention with regard to the £300.

The question whether this direction created a trust of the £300 was, by arrangement, raised on a summons in a suit for the administration of Ann Caplen's estate, which summons was now adjourned into court.

Mr. Colt, for Gainor Bulbeck. A parol declaration is enough to create a trust of personal property. The direction to hold the £300 for Mrs. Bulbeck and her children was equivalent to a declaration by the testatrix that the debt was to be held on trust for them. *M'Fadden v. Jenkyns*.

[THE MASTER OF THE ROLLS. The difficulty you have to contend with is, that the note was payable on demand. As payment was not demanded, there was no debt.]

The direction was equivalent to a demand. Instead of saying, "Pay me," the testatrix said, "Pay my sister and her daughters after my death;" and the debtor assented. Even admitting that, strictly speaking, you cannot create a trust unless you confer a legal title on the trustee. *Richards v. Delbridge*. Here a legal title was, in fact, conferred. The obligation on a promissory note payable on demand may

be discharged by parol. *Foster v. Dawber*.¹ What took place was equivalent to a release of the debt, in consideration of the debtor agreeing to apply the money as directed. The testatrix did not intend to release the debtor, except upon terms of payment to these persons. The money was at home in the debtor's hands, and there was no need or indeed power to give him a right to sue. The testatrix, therefore, did all in her power, save the formality of giving up the security, to create a trust, and I submit that a trust was well created.

Mr. B. B. Swan, for the executors, was not called on.

THE MASTER OF THE ROLLS. The evidence does not satisfy me that *Mrs. Caplen* intended to create an irrevocable trust. Whether she did or not, it is clear that at law she remained owner of the note, and did not therefore create a complete trust. The question that I have to decide is, whether the direction to *Mr. Stening* was enough to make him a trustee. *Mr. Colt* argued that it was, for he said the direction impressed a trust on the money, and a declaration of trust by the legal owner was not wanted. I think, however, that a mere agreement on the part of the debtor to apply the money according to the direction of the creditor will not do. There is no magic in words, and, as I explained in *Richards v. Delbridge*, a man may make himself a trustee without declaring that he is a trustee in so many words; but he must do something or other that is equivalent to declaring that he is a trustee. In *M'Fadden v. Jenkyns* Lord Cottenham certainly said: "The testator in directing *Jenkyns* to hold the money in trust for the plaintiff, which was assented to and acted upon by *Jenkyns*, impressed, I think, a trust upon the money which was complete and irrevocable." But I do not think that applicable to the present case, where there is nothing to show that the owner of the note intended to part with her legal title to the money.

I think, therefore, that the executors are entitled to require payment of the note.²

¹ 6 Ex. 839.

² In *Gaskell v. Gaskell*, 2 Y. & J. 502, *Hughes v. Stubbs*, 1 Hare, 476, and *Smith v. Warde*, 15 Sim. 56, directions by a creditor to his debtor to hold the debt for the benefit of a third person, or to pay it to such person, were held not to create any trust in favor of such person. But see criticisms and explanations of these cases in *Paterson v. Murphy*, 11 Hare, 88, 91, 92, and *Vandenberg v. Palmer*, 4 K. & J. 204, 214-217.—ED.

BADDELEY v. BADDELEY.

IN THE HIGH COURT OF JUSTICE, BEFORE SIR RICHARD MALINS, V. C.,
JULY 24, 1878.

[*Reported in 9 Chancery Division*, 113.]

ON the 30th of April, 1872, John Baddeley executed a deed-poll, of which the material part was as follows: "Whereas I am beneficially possessed of the ground-rents hereby intended to be settled, now in consideration of my love and affection for my wife I do hereby settle, assign, transfer, and set over unto my said wife Eliza Baddeley as though she were a single woman, her executors, administrators, and assigns, all that my share in [certain specified houses and ground-rents in Middlesex] as though she were now a *feme sole* and unmarried, and in accordance with the spirit and intention of the recent act of Parliament entitled the Married Women's Property Act, 1870."

This deed was duly registered in the Middlesex Registry, and Mrs. Baddeley entered into the receipt of the rents.

Mrs. Baddeley claimed a declaration that the deed-poll operated as a valid assignment, and a demurrer to the claim was put in on behalf of Mr. Baddeley's legal personal representatives.

J. Pearson, Q. C., and *Gregory*, for the legal personal representatives. There can be no possession of a wife separate from her husband: *Roe v. Wilkins*; ¹ therefore the assignment to the wife was invalid: *Moyse v. Gyles*; ² and, as an assignment was intended, the voluntary gift is void: *Richards v. Delbridge*. The testator had no intention of constituting a trust. *Moore v. Moore*; ³ *Milroy v. Lord*; *Warriner v. Rogers*.⁴

Glasse, Q. C., and *Methold*, for the widow. The word "settle" points to a declaration of trust, which is not the less good because the word "assign" is used in addition.

There is a valid declaration of trust, as in *Grant v. Grant*; *Mews v. Mews*; ⁵ *Lucas v. Lucas*; ⁶ *Richardson v. Richardson*; *Morgan v. Malleson*. The wife took possession under the deed, which supports the gift. *Walter v. Hodge*.⁷ The husband has shown his intention that the wife shall have the property, as in *Ashworth v. Outram*.⁸ The wife took subject to the rent, which prevents the deed being voluntary. *Price v. Jenkins*.⁹

J. Pearson, in reply.

¹ 4 A. & E. 86.

⁴ Law Rep. 16 Eq. 340.

⁷ 2 Sw. 92, 106.

² 2 Vern. 385.

⁵ 15 Beav. 529.

⁸ 5 Ch. D. 923.

³ Law Rep. 18 Eq. 474.

⁶ 1 Atk. 270.

⁹ 5 Ch. D. 619.

MALINS, V. C. No one can doubt that the husband's intention here was to give his wife the leasehold property ; but it is contended that the deed was intended to be an assignment, and is therefore inoperative as between husband and wife. No doubt a voluntary gift by way of assignment is invalid, unless it is perfected by a transfer ; the voluntary settlor must do all that he can do to transfer the property, and a husband cannot transfer to his wife. But this is, in my opinion, a case where the husband has declared himself a trustee for his wife, and she entered into possession, — an act which I construe, not as an attempt to take possession adversely to her husband, which could not be done, as is shown by *Roe v. Wilkins*,¹ but as a taking possession of her separate property under the trust. The husband was no doubt mistaken in thinking he could make this gift by way of assignment ; but there is enough in the deed to make it operate as a declaration of trust which the court ought to carry into effect. The law on this subject is correctly stated in *Grant v. Grant* ; and I am not disposed to disagree with *Richardson v. Richardson* and *Morgan v. Malleson*, notwithstanding the remarks of Sir G. Jessel in *Richards v. Delbridge*. I therefore declare that there is a trust properly constituted in favor of Mrs. Baddeley.²

¹ 4 A. & E. 86.

² *Fox v. Hawks*, 13 Ch. D. 822 ; *Jones v. Clifton*, 101 U. S. 225 ; *McMillan v. Peacock*, 57 Ala. 127 ; *Helmetag v. Frank*, 61 Ala. 67 ; *Barker v. Koneman*, 13 Cal. 9 (*semble*) ; *Dale v. Lincoln*, 62 Ill. 22 ; *Majors v. Everton*, 89 Ill. 56 ; *Sims v. Rickets*, 35 Ind. 181 ; *Brookbank v. Kennard*, 41 Ind. 339 ; *Wilder v. Brooks*, 10 Minn. 50 ; *Wells v. Wells*, 35 Miss. 638 ; *Shepard v. Shepard*, 7 Johns. Ch. 57 ; *Hunt v. Johnson*, 44 N. Y. 27 ; *Mason v. Libbey*, 19 Hun, 119 ; *Garner v. Garner*, Busbee, Eq. 1 ; *Crooks v. Crooks*, 34 Ohio St. 610 ; *Penn. Co. v. Neel*, 54 Pa. 9 ; *Story v. Marshall*, 24 Texas, 305 ; *Jones v. Oberchain*, 10 Grat. 259 ; *Putnam v. Bicknell*, 18 Wis. 333 ; *Hannan v. Oxley*, 23 Wis. 519, *accord*.

Fowler v. Trebein, 16 Ohio St. 493, 497 ; *Crooks v. Crooks*, 34 Ohio St. 610, 615 (*semble*), *contra*.

In *Adams v. Adams*, 21 Wall. 185, where a husband signed, and had recorded, a deed of conveyance of real estate to A., in trust for his wife, but the deed failed to transfer the legal estate because of the refusal of A. to become a party to the conveyance, it was held that an irrevocable trust had nevertheless been created for the wife.

But in *Woodford v. Charnley*, 28 Beav. 96, where one who held the legal estate in a certain freehold to secure the payment of £5,000, for which payment, however, no one was personally liable, assigned, by a voluntary deed, his interest in the said £5,000 to trustees upon certain trusts therein declared, Sir John Romilly, M. R., decided that the deed was wholly inoperative. See *Lane v. Ewing*, 31 Mo. 75. — ED.

BENJAMIN GROVER, ADMINISTRATOR, v. CHARLES W. GROVER.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, OCTOBER 17, 1835,
MARCH 20, 1837.

[*Reported in 24 Pickering, 261.*]

ASSUMPSIT upon a promissory note made by the defendant, and payable to the order of Hiram S. Grover, the plaintiff's intestate.

At the trial, before Putnam J., it appeared that in March, 1832, Grover V. Blanchard called to see the intestate. Upon an inquiry being made, whether the intestate had put on record a deed of mortgage given to secure the payment of the note in question, the intestate produced the deed, which had not then been recorded, and the note, and said to Blanchard, "I will make a present of these to you, if you will accept them." Blanchard then took them and put them in his pocket, saying that he would accept them as a token of love, or affection, or respect. Before they parted, Blanchard handed them back to the intestate, saying to him, "You may keep the papers until I call for them, or collect them for me." No assignment was made on the note or mortgage. Afterwards the intestate put the mortgage deed on record. The plaintiff, after the death of the intestate, in October, 1832, took the deed from the register's office, and, having received of the defendant payment of the amount secured thereby, discharged the mortgage. Upon the death of the intestate, the note was found in his chest, with his papers; and Blanchard took it, refused to deliver it to the plaintiff, and caused this action to be brought.

The defendant contended: 1. That no valid gift of a chose in action could be made *inter vivos* without writing; 2. That the name of the donor, or of the administrator or executor of the donor, could not be used without his consent, in an action brought for the use of the donee; and, 3. That the donor could not, by law, act as the agent of the donee to keep the papers or collect the money.

The jury found that the intestate did intend to give the property contained in the note and mortgage, absolutely, to Blanchard.

The whole court were to determine, upon these facts, whether or not the property passed and vested in Blanchard, and whether or not he might maintain this action without the consent of the nominal plaintiff, for his own use, under the facts and circumstances above stated.

Keyes and *Farley*, for the defendant.¹

Hoar, for the plaintiff.

¹ The arguments of counsel are omitted. — ED.

WILDE, J., delivered the opinion of the court. The jury have found that the deceased intended to give the property in the note, and in the mortgage made to secure it, absolutely, to Blanchard; and the question is, whether by the rules of law this intention can be carried into effect.

It is objected that no valid gift of a chose in action can be made *inter vivos*, without writing, and this objection would be well maintained, if a legal transfer of a chose in action were essential to give effect to a gift. But as a good and effectual equitable assignment of a chose in action may be made by parol, and as courts of law take notice of and give effect to such assignments, there seems to be no good foundation for this objection. It is true that the cases, which are numerous, in which such equitable assignments have been supported, are founded on assignments for a valuable consideration; but there is little, if any, distinction in this respect between contracts and gifts *inter vivos*; the latter, indeed, when made perfect by delivery of the things given, are executed contracts. 2 Kent's Comm. (3d ed.) 438. By delivery and acceptance the title passes, the gift becomes perfect, and is irrevocable. There is, therefore, no good reason why property thus acquired should not be protected as fully and effectually as property acquired by purchase. And so we think that a gift of a chose in action, provided no claims of creditors interfere to affect its validity, ought to stand on the same footing as a sale.

The cases favorable to the defence do not depend on the question whether an assignment must be in writing, but on the question whether a legal transfer is not necessary to give validity to a donation of a chose in action. The donation of a note of hand payable to bearer, or of bank-notes, lottery-tickets, and the like, where the legal title passes by delivery, is good; for by the form of the contract no written assignment is necessary; but as to all other choses in action, negotiable securities excepted, it has been held in several cases that they are not subjects of donation *mortis causa*, on the ground, undoubtedly, for I can imagine no other, that a legal assignment is necessary to give effect to such donations; and the same reason would apply to donations *inter vivos*. The leading case on this point is that of *Miller v. Miller*,¹ in which it was held that the gift of a note, being a mere chose in action, could not take effect as a donation *mortis causa*, because no property therein could pass by delivery, and an action thereon must be sued in the name of the executor. But in *Snellgrave v. Bailey*,² Lord Hardwicke decided that the gift and delivery over of a bond was good as a donation *mortis causa*, on the ground that an equitable assignment of the bond was sufficient. It seems to be very difficult to reconcile the two cases. The distinction suggested by Lord Hardwicke in the case of *Ward v. Turner*,³ in which he adheres to

¹ 3 P. Wms. 356.

² 3 Atk. 214.

³ 2 Ves. Sen. 431.

the decision in *Snellgrave v. Bailey*, is technical, and, to my mind, unsatisfactory; and certainly has no application to our laws, which place bonds and other securities on the same footing. We cannot, therefore, adopt both decisions without manifest inconsistency; and we think, for the reasons already stated, that the decision in *Snellgrave v. Bailey* is supported by the better reasons, and is more conformable to general principles, and the modern decisions in respect to equitable assignments. We are, therefore, of opinion that the gift of the note of hand in question is valid; and in coming to this conclusion we concur with the decision in the case of *Wright v. Wright*,¹ wherein it was held that the gift and delivery over of a promissory note, *mortis causa*, is valid in law, although the legal title did not pass by the assignment.

It is not necessary to decide whether the gift of the mortgage security is valid, although it is reported to have been said by the Vice-Chancellor, in the case of *Duffield v. Elwes*,² that a mortgagor was not compellable to pay the mortgage debt without having back the mortgage estate; and for that and other reasons he decided that a mortgage was not a subject of a gift *mortis causa*. This decision, however, was afterwards overruled in the House of Lords, *Duffield v. Elwes*,³ on the ground that the gift of the debt operated as an equitable assignment of the mortgage. But as we think it clear that the right to maintain this action does not depend on that question, we give no opinion in regard to it.

Another objection is, that if the gift was valid and complete, by the delivery of the note, it was annulled by the redelivery to the donor. We think this objection also is unfounded. In the case of *Bunn v. Markham*,⁴ Gibbs, C. J., lays it down as a well-settled principle, that if after a donation *mortis causa* the donor resumes possession, he thereby revokes and annuls the donation. This is the law, no doubt. Whether there may not be an exception to this rule, when the donor takes back the thing given at the request of the donee, for a particular purpose, and agrees to act as his agent under circumstances negating every presumption that he intended to revoke his gift, is a question which it is not necessary now to consider; for the principle has no relation to a donation *inter vivos*. When such a donation is completed by delivery, the property vests immediately and irrevocably in the donee; and the donor has no more right over it than any other person. But a donation *mortis causa* does not pass a title immediately, but is only to take effect on the death of the donor, who in the mean time has the power of revocation, and may at any time resume possession and annul the gift.

The last objection to the maintenance of this action by Blanchard, in the name of the administrator, has been sufficiently answered in consid-

¹ 1 Cowen, 598.

³ 1 Bligh N. R. 497.

² 1 Sim. & Stu. 243.

⁴ 7 Taunt. 230.

ering the first objection. It is contended that the consent of the administrator is necessary. But if an equitable assignment is sufficient to complete the gift, it follows that the administrator is trustee, and cannot set up his legal right in order to defeat the trust. This is fully established by the cases of *Duffield v. Elwes*,¹ *Hunt v. Beach*,² and *Duffield v. Hicks*.³

*Judgment for plaintiff for the use of Blanchard.*⁴

JOHN C. WINANS AND OTHERS, APPELLANTS, v. CORBET
PEEBLES AND OTHERS, RESPONDENTS.

IN THE COURT OF APPEALS, JUNE, 1865.

[Reported in 32 New York Reports, 423.]

• DAVIES, J.⁵ Action by plaintiffs, as heirs-at-law of Catharine Peebles, deceased, to set aside a deed of certain premises, of which it is claimed she died seised, and which descended to them as her heirs-at-law, made by said Catharine to her husband, Corbet Peebles, be declared and

¹ 1 Bligh N. R. 497.

² 5 Madd. Ch. 351.

³ 1 Dow, 1.

⁴ A gift, accompanied by a delivery of the instrument, was held to pass the equitable interest in an obligation, in the following cases :—

NOTES : *Jones v. Deyer*, 16 Ala. 221, 225 (*semble*) ; *Wing v. Merchant*, 57 Me. 383 ; *Hale v. Rice*, 124 Mass. 292 ; *Westerlo v. De Witt*, 36 N. Y. 340 (*semble*) ; *Mack v. Mack*, 3 Hun, 323 ; *Brunson v. Brunson*, Meigs, 630.

But see *Thompson v. Dorsey*, 4 Md. Ch. 149, *contra*.

BONDS : *Hunt v. Hunt*, 119 Mass. 474 ; *Gilchrist v. Stevenson*, 9 Barb. 9 ; *Hunter v. Hunter*, 19 Barb. 631 ; *Hackney v. Vrooman*, 62 Barb. 650 ; *Pringle v. Pringle*, 59 Pa. 281 ; *Elam v. Keen*, 4 Leigh, 333 ; *Lee v. Boak*, 11 Grat. 182 (*semble*), *accord*.

But see *Johnson v. Spies*, 5 Hun, 468 (*semble*), *contra*.

POLICIES OF INSURANCE : *Lemon v. Phoenix Co.*, 38 Conn. 294 ; *Otis v. Beckwith*, 49 Ill. 121 ; *N. Y. Co. v. Flack*, 3 Md. 341 ; *Crittenden v. Phoenix Co.*, 41 Mich. 442 ; *Bond v. Bunting*, 78 Pa. 210.

DEPOSITOR'S PASS-BOOKS : *Camp's Appeal*, 36 Conn. 88 ; *Hill v. Stevenson*, 63 Me. 364 ; *Kimball v. Leland*, 110 Mass. 325 ; *Foss v. Lowell Bank*, 111 Mass. 285 ; *Davis v. Ney*, 125 Mass. 590 ; *Penfield v. Thayer*, 2 E. D. Sm. 305.

Murray v. Cannon, 41 Md. 466, *contra*.

LOTTERY TICKET : *Grangiac v. Arden*, 10 Johns. 293.

In *Bowring v. King*, 37 Ala. 606 (Note), *Hitch v. Davis*, 3 Md. Ch. 266 (Note), *Cox v. Hill*, 6 Md. 274 (Bond), *Montgomery v. Miller*, 3 Redf. 154 (Note), there being no delivery, it was held that the gift passed no interest, either legal or equitable.

In *Fairly v. McLean*, 11 Ired. 158, *Brickhouse v. Brickhouse*, 11 Ired. 404, *Overton v. Sawyer*, 7 Jones (N. Ca.), 6, the donor of unindorsed negotiable paper was held entitled to maintain trover against the donee for the instrument. But see *Barton v. Gainer*, 3 H. & N. 387 (Bond) ; *Witt v. Amis*, 1 B. & S. 109 (Policy of insurance), *contra*.

As to gifts of obligations *mortis causa*, see 2 Ames, Cases on Bills and Notes, 700, 701. — ED.

⁵ See *supra*, p. 79, n. 1. — ED.

adjudged void, and that a deed of the same premises, by said Corbet to the defendant Burdick, be also declared void, and the plaintiffs be adjudged entitled to said premises, and that they be entitled to recover the same, and the rents and profits thereof. The court, which tried the action without a jury, found the following facts, viz.:—

1. That on the 15th day of March, 1851, Catharine M. Peebles received, by gift from her father, William Steele, a conveyance of the land and premises described in the complaint, the purchase-money thereof having been paid by said Steele, and the conveyance made by one Hughson and wife, the owner of the same.

2. That on the 28th day of June, 1851, the said Catharine made a voluntary conveyance of the same premises to said Corbet Peebles, and that no consideration was paid by the said Corbet or received by the said Catharine therefor.

3. That at the time of the said conveyances and for ten years previous thereto, the said Catharine was the wife of the said Corbet, and that there was no issue of the marriage of the said Corbet and the said Catharine.

4. That the plaintiffs in this action are the only heirs-at-law of the said Catharine, being the issue of the said Catharine by a former marriage.

5. That said conveyance by said Catharine to said Corbet was not made or procured by any undue influence on the part of the said Corbet.

6. That said conveyance was made by said Catharine in pursuance of a request made by her father at the time the property was given to her, and her verbal promise to him to convey the same to her husband after her father's decease. And the court found the following conclusions of law:—

1. That said conveyance by said Catharine to said Corbet was a good and valid conveyance, and vested in him a perfect title at law, notwithstanding she was, at the time of such conveyance, the wife of the said Corbet.

2. That even if such conveyance was not a valid conveyance at law, the same was good and might be sustained in equity.

Judgment was thereupon given for the defendants, and the same was affirmed at General Term, and the plaintiffs now appeal to this court.

This case was decided at the Steuben Special Term, in 1859, when a very elaborate and able opinion was delivered by the learned justice who tried the action, sustaining the conclusions of law at which he arrived. The only reported decision to which his attention was called, maintaining a contrary doctrine, was that of *Graham v. Van Wyck*,¹ a Special Term decision by Mr. Justice Barculo. The learned justice

¹ 14 Barb. 531.

did not regard this as an authoritative decision, and proceeded to discuss, with much learning and force, the two questions involved, and arrived at the conclusion that the conveyance from the wife direct to the husband could be maintained at law and also in equity. The general term of the Supreme Court would seem to have concurred in those views. Both the points presented and passed upon in the court below arose and were considered by this court in the case of *White v. Wager*,¹ decided in September, 1862, the report of which was published in 1863.² The points adjudicated received an ample and careful discussion, and nothing can be added to the force of the conclusions then reached. They there held that a deed executed by a married woman to her husband, under circumstances very similar to those presented in the case at bar, was wholly ineffectual and void, and that the defective conveyance, being wholly without consideration, a court of equity would not interfere to sustain it. The doctrine of that case is decisive of the present one, and the judgment appealed from must be reversed, and a new trial ordered, costs to abide the event.

On another trial, it will be competent for the defendant Peebles to seek to establish the validity of the deed by the application to the case of the principle of equity, upon proof that it was not voluntary, but given upon consideration. It will be competent for him to show that he is entitled to equitable relief, to the extent of the consideration paid by him, and of the value of the improvements made by him upon said premises. 1 Story Eq. Jur. §§ 64, 693, 694, 700, 700 a, 797.

Judgment reversed; new trial ordered, without prejudice to the equities of respondent, for his advances toward the land and improvements made upon faith of his title.³

¹ 25 N. Y. 328.

² In *Hunt v. Johnson*, 44 N. Y. 27, Hunt, C., said, p. 35: "In *White v. Wager*, the question of the equitable interposition of the court did not and could not arise. The action was to recover damages for breach of warranty of title." — Ed.

³ *Kinnaman v. Pyle*, 44 Ind. 275; *White v. Wager*, 25 N. Y. 328 (*semble*), *accord*. See *Hunt v. Johnson*, 44 N. Y. 27, 35-37; *Townshend v. Townshend*, 1 Abb. N. C. 81. — Ed.

MARIANNA RAY v. JOSIAH SIMMONS, ADMINISTRATOR.

IN THE SUPREME COURT, RHODE ISLAND, DECEMBER 27, 1875.

[Reported in 11 *Rhode Island Reports*, 266.]

BILL in equity to establish a trust.

DURFEE, C. J. The principal question in this case is whether the plaintiff is beneficially entitled to a sum of money which was formerly on deposit in the Fall River Savings Bank. The deposit was made by the late Levi Bosworth, in his own name, as trustee, for the plaintiff, — the account contained in the bank-book which was furnished to Bosworth being headed as follows, to wit: “Dr. Fall River Savings Bank in account with Levi Bosworth, trustee for Marianna Ray, Prov. Cr.” The first deposit of \$484 is credited as cash, under the date of April 6, 1868. The account is also credited with cash, October 31, 1868, \$50, and January 8, 1872, \$70, and with divers dividends. All the dividends were credited as they accrued, except one of \$25.66, which was paid to Bosworth, October 12, 1870. And this was the only money withdrawn from the deposit by him previous to his death, which occurred September 15, 1872. The plaintiff, Marianna Ray, is the daughter of Ruth M. Bosworth, the widow of Levi Bosworth, by a former husband. She lived in the family of Levi Bosworth for several years previous to his death. Levi Bosworth had no children. Mrs. Bosworth testifies that he treated the plaintiff as his daughter. She also testifies that the first she knew of the bank-book, Mr. Bosworth brought it home and threw it in the plaintiff’s lap. The plaintiff opened and read it, and said she was much obliged for the present. Bosworth said nothing in reply. She, Mrs. Bosworth, put the book in a box where she kept her own bank-book, a bank-book of her daughter, and bank-books belonging to her husband. She says he carried the book to Fall River three times to have the interest entered, and gave it to the plaintiff on his return. He was a man of few words, and would do things without explanation. When he made the last deposit of \$70 and gave the plaintiff notice of it, she, Mrs. Bosworth, said to him: “I don’t know about your making such presents!” to which he replied, “I shouldn’t think you need trouble yourself about it; if anything happens to her, you will hold it.”

The plaintiff claims to be entitled to the deposit, as money held in trust for her by Levi Bosworth. The defendant, as administrator on Bosworth’s estate, resists the claim. His answer to her bill avers on information and belief that Bosworth made the deposit in his name as trustee for his own convenience, and because he had another deposit in

his own name to as large an amount as the bank would receive on any one account, and therefore, to induce the bank to receive the further deposit, he put it in his name as trustee, as is a very common practice in such cases, always retaining the book under his own control. In support of this averment, the defendant testified that Bosworth told him, when he was building his house, that he had money deposited in the Fall River Savings Bank, in his own name, to as large an amount as he could deposit in his own name, and in another person's name, but did not say in whose name. He also testified to conduct and admissions, on the part of the plaintiff and her mother, at variance with the plaintiff's present claim. We, however, refrain from reciting this testimony, because, in view of the explanations given by Mrs. Bosworth, we are not prepared to believe that her testimony is substantially incorrect.

The defendant contends that the plaintiff is not entitled to relief, because there was no effectual trust, inasmuch as Bosworth, by retaining the book, always kept and intended to keep control over the deposit for his own use, and did in fact so control it by receiving the dividend which was paid to him October 12, 1870.

We think, however, the trust was completely constituted. Levi Bosworth deposited the money in the bank to himself as trustee. The bank, receiving it, credited it to him as trustee, and from time to time credited to him as trustee the dividends accruing thereon. It gave him a bank-book in which these credits were entered. Bosworth moreover communicated to the plaintiff the fact that he had made the deposit to himself as her trustee by letting her have the book. It is urged that the book was returned to him by her, and retained by him. But the book was given by the bank to him as trustee, and as trustee he would properly retain it. All was done which the plaintiff could ask, unless she desired to have the money paid or transferred to her, which would be not constituting the trust, but carrying into effect and discharging it. Bosworth might have declared himself more explicitly; but, supposing his object was to create a trust and make himself the trustee, we can think of no act necessary to effect his purpose which he has left undone.

When the trust is voluntary, courts of equity do not enforce it, so long as it remains inchoate or incomplete; but when once the trust has been constituted, they do not refuse relief because it is voluntary. *Stone et al. v. King et als.*¹ A person need use no particular form of words to create a trust, or to make himself a trustee. It is enough if, having the property, he conveys it to another in trust, or, the property being personal, if he unequivocally declares, either orally or in writing, that he holds it *in præsentî* in trust, or as a trustee for another.

¹ 7 R. I. 358.

Ex parte Pye; Milroy v. Lord; Richardson v. Richardson; Kekewich v. Manning; Morgan v. Malleson; Penfold v. Mould;¹ Wheatley v. Purr; M'Fadden v. Jenkyns; Thorpe v. Owen.² And the creation of the trust, if otherwise unequivocal, is not affected by the settlor's retention of the instrument of trust, especially where he is himself the trustee. Exton v. Scott;³ Fletcher v. Fletcher;⁴ Carson's Adm'r v. Phelps;⁵ Souverbye et ux. v. Arden et als.;⁶ Bunn v. Winthrop et als.⁷

In Wheatley v. Purr, the settlor instructed her bankers, with whom she had a deposit of £3,000, to place £2,000 in the joint names of the plaintiffs and her own, as trustee for the plaintiffs. The sum of £2,000 was entered by the bankers in their books to the account of the settlor as trustee for the plaintiffs, and a promissory note given for it payable to the settlor trustee for the plaintiffs, or order, fourteen days after sight. A receipt for this note was signed by the settlor and given to the bankers. The trust was held to be effectually created. In our opinion, the case is not distinguishable from the case at bar. Indeed, the case at bar is stronger, in that notice of the trust was communicated to the *cestui que trust*. And see Millspaugh v. Putnam;⁸ Howard, Adm'r, v. Savings Bank.⁹

The counsel for the defendant calls our attention to the declaration made by Mr. Bosworth, while his house was building. The declaration was casually made, and may have been misunderstood. But, supposing it was correctly understood, we do not think we can allow it to alter our decision. The trust, except in so far as it was increased by subsequent deposits, was, in our opinion, created before the declaration was made; and no such declaration made after the creation of the trust could have any legitimate effect on it. The same is true in regard to the withdrawal of the dividend. It may be remarked, also, that the dividend withdrawn was more than replaced by the seventy dollars afterwards deposited.

The counsel for the defendant also calls our attention to the cases of Brabrook v. Boston Five Cents Savings Bank,¹⁰ and Clark v. Clark.¹¹ These are cases in which A. deposited money in a savings bank in his own name as trustee for B., but always retained the bank-book, and never communicated to B. any notice of the deposit. They are cases at law. The court ruled that B. was not entitled to the deposit, being neither party nor privy to the transaction. In one of the cases, the court found, as a fact affirmatively proved, that no actual gift or trust was intended. We do not think the cases are precedents which should govern the decision of the case at bar.

¹ L. R. 4 Eq. 562.² 5 Beav. 224.³ 6 Sim. 31.⁴ 4 Hare, 67.⁵ 14 Am. Law Reg. N. S. 100.⁶ 1 Johns. Ch. 240.⁷ 1 Johns. Ch. 329.⁸ 16 Abb. Pr. 380.⁹ 40 Vt. 597.¹⁰ 104 Mass. 228.¹¹ 108 Mass. 522.

The bill is against the defendant, as administrator on the estate of Levi Bosworth. It alleges that the defendant, as administrator, has withdrawn the deposit and now has it in his possession, and refuses to pay it to the plaintiff. The answer alleges that the defendant was appointed administrator in Massachusetts, and as such withdrew the deposit; but does not deny that he now holds it as administrator in this State, but avers that he now holds the same as a part of the estate of the decedent. From this we presume that he holds it as administrator in this State. In this view, we think that the defendant may be held to account directly with the plaintiff, and will decree accordingly.

Decree, January 22, 1876, ordering the respondent to pay to the complainant the whole deposit, with interest, in the Fall River Savings Bank, standing in the name of Levi Bosworth, trustee.¹

L. & C. M. Salisbury, for complainant.

Tillinghast & Ely, for respondent.

¹ *Millspaugh v. Putnam*, 16 Abb. Pr. 380; *O'Brien*; 11 R. I. 419, *accord*.

The trust is none the less effectually created although the depositor retains the pass-book in his possession, and gives no notice of the deposit to the *cestui que trust* during his lifetime. *Minor v. Rogers*, 40 Conn. 512; *Witzel v. Chapin*, 3 Bradf. 386; *Smith v. Lee*, 2 Th. & C. 591; *Martin v. Funk*, 75 N. Y. 134. The decisions to the contrary in *Stone v. Bishop*, 4 Cliff. 593, *Clark v. Clark*, 108 Mass. 522, *Cummings v. Bramhall*, 120 Mass. 554, seem not to have been well considered, but to have been founded upon a misconception of the case of *Brabrook v. Boston Bank*, 104 Mass. 228, which case, like *Field v. Lonsdale*, 13 Beav. 78, *Powers v. Provident Inst.*, 124 Mass. 377, *Jewett v. Shattuck*, 124 Mass. 590, and *Weber v. Weber* (N. Y. S. Ct. 1879), 21 Alb. L. J. 51, is to be supported upon the ground that there was no intention to create a trust in that case, the ostensible deposit in trust being made *diverso intuitu*.

A deposit in a bank by A. in the name of B. is a complete gift to B., if so intended by A.: *Stapleton v. Stapleton*, 14 Sim. 186; *Mews v. Mews*, 15 Beav. 529, 533, 534 (*semble*); *Gardner v. Merritt*, 32 Md. 78; *Blasdel v. Locke*, 52 N. H. 238; even though B. has no knowledge of the deposit before A.'s death; *Howard v. Windham Bank*, 40 Vt. 597. But a contrary intention may be shown. *Broderick v. Waltham Bank*, 109 Mass. 149. See also *Taylor v. Henry*, 48 Md. 550. The same principle applies to a policy of life insurance taken out by A. in B.'s name: *Lemon v. Phoenix Co.*, 38 Conn. 294; or to stock entered by A. in B.'s name upon the books of the company: *Kilpin v. Kilpin*, 1 M. & K. 520; *Adams v. Brackett*, 5 Met. 280. — ED.

CHAPTER II.

THE LANGUAGE NECESSARY TO THE CREATION OF A TRUST.

HARDING v. GLYN.

IN CHANCERY, BEFORE HON. JOHN VERNEY, M. R., JUNE 7, 1739.

[*Reported in 1 Atkyns, 469.*]

NICHOLAS HARDING in 1701 made his will, and thereby gave “to Elizabeth, his wife, all his estate, leases, and interest in his house in Hatton Garden, and all the goods, furniture, and chattels therein at the time of his death, and also all his plate, linen, jewels, and other wearing-apparel, but did desire her at or before her death to give such leases, house, furniture, goods and chattels, plate and jewels, unto and amongst such of his own relations as she should think most deserving and approve of,” and made his wife executrix, and died the 23d of January, 1736, without issue.

Elizabeth, his widow, made her will on the 12th of June, 1737, “and thereby gave all her estate, right, title, and interest to Henry Swindell in the house in Hatton Garden, which her husband had bequeathed to her in manner aforesaid; and after giving several legacies, bequeathed the residue of her personal estate to the defendant Glyn and two other persons, and made them executors,” and soon after died, without having given at or before her death the goods in the said house, or without having disposed of any of her husband’s jewels, to his relations.

The plaintiffs insisting that Elizabeth Harding had no property in the said furniture and jewels but for life, with a limited power of disposing of the same to her husband’s relations, which she has not done, brought their bill in order that they might be distributed amongst his relations, according to the rule of distribution of intestates’ effects.

MASTER OF THE ROLLS. The first question is, If this is vested absolutely in the wife? And the second, If it is to be considered as undisposed of, after her death, who are entitled to it?

As to the first, it is clear the wife was intended to take only beneficially during her life; there are no technical words in a will, but the manifest intent of the testator is to take place, and the words “willing” or “desiring” have been frequently construed to amount to a

trust, *Eacles et ux. v. England et ux.*; ¹ and the only doubt arises upon the persons who are to take after her.

Where the uncertainty is such that it is impossible for the court to determine what persons are meant, it is very strong for the court to construe it only as a recommendation to the first devisee, and make it absolute as to him; but here the word "relations" is a legal description, and this is a devise to such relations, and operates as a trust in the wife, by way of power of naming and apportioning, and her non-performance of the power shall not make the devise void, but the power shall devolve on the court; and though this is not to pass by virtue of the statute of distributions, yet that is a good rule for the court to go by. And therefore I think it ought to be divided among such of the relations of the testator Nicholas Harding, who were his next of kin at her death; and do order that so much of the said household goods in Hatton Garden, and other personal estate of the said testator Nicholas Harding, devised by his will to the said Elizabeth Harding, his wife, which she did not dispose of according to the power given her thereby, in case the same remains in specie, or the value thereof, be delivered to the next of kin of the said testator Nicholas Harding, to be divided equally amongst them, to take place from the time of the death of the said Elizabeth Harding.²

¹ 2 Vern. 466.

² In the following case the language was held to be mandatory, and therefore to create a trust: *Brown v. Higgs*, 8 Ves. 561. ("I authorize and empower my nephew John Brown to receive the rent," &c., "and to dispose of it in the following manner, that is to say, to take £100 of it every year to his sole and separate use, and to employ the remainder . . . to such children of my nephew Samuel Brown as my said nephew John Brown shall think most deserving, and that will make the best use of it.")

Birch v. Wade, 3 V. & B. 198 ("It is my Will and Desire that the other third Part of the Principal of my Estate and Effects be left entirely to the Disposal of my dear and loving Wife among such of her Relations as she may think proper after the Death of my aforesaid Sisters");

Prevost v. Clark, 2 Mad. 458 ("Convinced of the high sense of honor, the probity and affection of my Son in Law, Edward Clarke, I entreat him, should he not be blessed with children by my Daughter, and survivor, that he will leave at his decease to my Children and Grandchildren the share of my property I have bestowed upon her");

Forbes v. Ball, 3 Mer. 437 ("I give to my dear wife, Ann Cotterel, the sum of £500; and it is my will and desire that my said wife, Ann Cotterel, may dispose of the same amongst her relations, as she by will may think proper");

Salisbury v. Denton, 3 K. & J. 529 ("The remainder of said moiety to be at her disposal among my relations, in such proportions as she may be pleased to direct"), — the language was held to be mandatory, and therefore to constitute a trust.

In *Brown v. Higgs*, *supra*, Lord Eldon said, p. 570: "It is perfectly clear that, where there is a mere power of disposing, and that power is not executed, this court

HARLAND v. TRIGG.

IN CHANCERY, BEFORE LORD THURLOW, C., —, 1782.

[*Reported in 1 Brown's Chancery Cases, 142.*]

RICHARD HARLAND, being seised in fee of the manor of Sutton, in the county of York, and having four sons, Philip, John, Richard (the plaintiff), and Francis, by his will in 1747 devised the said manor (with other lands) to Philip, the eldest son, for life, with remainder to his first and other sons in tail male, remainder to John, the second son, for life, remainder to the plaintiff for life, remainder to Richard for life, with like remainders to their several first and other sons, and with further remainders over. Richard, the father, died in 1750; Philip entered, and, being himself also possessed of leasehold estates in Sutton, some for lives and others for years, by his will, made in the year 1764, gave his leasehold estate for lives to the trustees of his father's will, to the same uses to which the lands devised by the father's will were limited, so far as by law he could; and then followed this clause: "And all other my leasehold estates in the parish or township of Sutton I give to my brother John Harland, for ever, hoping he will continue them in the family." Philip died in 1766. John entered on the estate, and died in 1772, having made his will and given these leasehold estates to his widow, whom he made executrix, and who since married the defendant Trigg. Richard, the third son, filed this bill, insisting the devise in Philip's will subjected these estates to the same uses as those declared by the father's will, that he was, therefore, entitled to the next estate in remainder, and praying that it might be so declared.

Mr. Attorney-General, Mr. Madocks, Mr. Ainge, and Mr. Spranger contended that John had an estate only for life; they argued that a

tion of that trust fails by the death of the trustee, or by accident, this court will execute the trust. One question, therefore, is, whether John Brown had a trust to execute, or a power, and a mere power. But there are not only a mere trust and a mere power, but there is also known to this court a power which the party to whom it is given is intrusted and required to execute; and with regard to that species of power the court consider it as partaking so much of the nature and qualities of a trust, that if the person who has that duty imposed upon him does not discharge it, the court will, to a certain extent, discharge the duty in his room and place. Upon that principle, the case of *Harding v. Glyn* proceeded. But that case cannot be got rid of by saying it is a singular case, and that it is difficult to reconcile all subsequent cases with it; for that case has been treated as a clear authority, probably for the whole, certainly by my own experience for a very considerable part, of the time elapsed since that judgment was pronounced." See also *Burrough v. Philcox*, 5 M. & Cr. 73, and conf. *Marlborough v. Godolphin*, 2 Ves. 61. — ED.

request in a will is sufficient to raise a trust, and is equivalent to a devise; for this they cited *Harding v. Glyn*. The case upon the will of Wortley Montague, in the House of Lords,¹ *Richardson v. Chapman*, also in the House of Lords,² and contended that, here, the intention must be that the estates should go to the uses in the father's will.

LORD CHANCELLOR. I have no doubt but a requisition made with a clear object will amount to a trust. In the case of the Duchess of Buckingham's will, the words were very gentle, but had a distinct object. But where the words are not clear as to their object, they cannot raise a trust. Where this testator had a leasehold estate, which he meant should go to the family, he has used apt words; therefore, where he has not used such words, he had a different intent.

Mr. Mansfield and *Mr. Lloyd*, for the defendant, argued that by the word "family" he had not pointed out any particular branch of the family; although "relations" is a well-known technical word, "family" is not; the devise would have been satisfied by giving it to any branch of the family. They further observed that, in the former devise, he had given the lands he meant to go together, to trustees, in accurate language, and that, if he had intended these estates to be under the same trust, he would have used the same words.

Mr. Attorney-General, in reply, insisted here was a manifest attention to the object contended for by the plaintiffs, from the circumstance of the testator's passing by his daughters and giving it to John Harland. This showed that by "family" he did not mean children, and said that, if the subject of the devise had been personal property, as the goods in his house, it would have been sufficient to have made those goods heirlooms.

LORD CHANCELLOR. I think every will ought to be construed according to the intent of the testator, where it can be collected. In order to make a title, the plaintiff states that the father had settled his estates in strict settlement, and insists that I shall understand this devise as giving the leasehold estates to the same uses, as nearly as their nature will admit. The testator gives other estates to trustees, subject to charges, to the uses in that settlement; he, therefore, understood how to make his estates liable to those uses, and intended something different here. The argument is, that there will be part of the will ineffectual, the words "hoping that he will continue them in the family:" the answer is, that the words are precatory, not imperative. Another argument made use of is, that, if this was furniture, the devise would carry it: but, if so, it would be on this ground that he recollected that the house would pass, and meant the furniture should remain attached to it under all its limitations. That case has peculiarities that do not

¹ *Earl of Bute v. Stuart*, 5 Brown's Parl. Cases, 534. [1 vol. 476, Toml. edit.]

occur here. It would be a great deal too much to tie this up as a strict settlement. I had a doubt whether the family could not claim some interest in the subject, but when I come to consider, I take the rule of law to be this: that two things must concur to constitute these devises, — the terms and the object. Hoping is in contradistinction to a direct devise; but whenever there are annexed to such words precise and direct objects, the law has connected the whole together, and held the words sufficient to raise a trust: but then the objects must be distinct; where there is a choice, it must be in the power of the devisee to dispose of it either way. If he had sold these leaseholds, the family could not have taken them from the vendee, or if he had given them to any one part of the family, the others could have no remedy. The will does not import a devise, as the words do not clearly demonstrate an object. I am therefore of opinion that the bill must be dismissed.¹

¹ In the following cases the language was held to be precatory merely, and therefore to create no trust: *Meredith v. Heneage*, 1 Sim. 542 ("I have devised and bequeathed the whole of my said real and personal estate, hereinbefore particularly set forth, unto my said dear Wife . . . unfettered and unlimited, in full confidence and with the firmest persuasion that, in her future disposition and distribution thereof, she will distinguish the heirs of my late Father, by devising and bequeathing the Whole of my said estate, together and entire, to such of my said Father's heirs as she may think best deserves her preference").

Benson v. Whittam, 5 Sim. 22 ("The residue of said dividends to my Brother, Arthur Benson, to enable him to assist such of the Children of my deceased Brother, Francis Benson, as he the said Arthur Benson shall find deserving of encouragement").

Johnston v. Rowlands, 2 De G. & Sm. 356 ("As to the sum of \$2,000 . . . I give the same to my said wife, to be disposed of by her will in such way as she shall think proper; but I recommend her to dispose of one half thereof to her own relations, and the other half among such of my relations as she shall think proper").

Williams v. Williams, 1 Sim. N. s. 358 ("It is my wish that you [the testator's wife] should enjoy everything in my power to give, using your judgment as to whom to dispose of it amongst your children when you can no longer enjoy it yourself; but I should be unhappy if I thought it possible that any one, not of your family, should be the better for what, I feel confident, you will so well direct the disposal of").

Green v. Marsden, 1 Drew. 646 (Bequest of stock to a wife. "And I beg and request that at her death she will give and bequeath the same in such shares as she shall think proper, unto such members of her own family as she shall think most deserving of the same").

Reeves v. Baker, 18 Beav. 372 ("The residue of my property . . . to my beloved wife, Mary Rees, her heirs and assigns forever, being fully satisfied that . . . she will dispose of the same, by will or otherwise, in a fair and equitable manner, to our united relations, bearing in mind that my relations are generally in better worldly circumstances than hers are").

Howorth v. Dewell, 29 Beav. 18 ("All the residue . . . I do give, devise, and bequeath unto my dear wife, with power for her to dispose of the same unto and amongst all my children, or to any one or more of them, for such estate or estates, either in fee-simple or in tail, term of life or other interest, temporary or lasting, or in such other shares,

WYNNE v. HAWKINS.

IN CHANCERY, BEFORE LORD THURLOW, C., —, 1782.

[Reported in 1 Brown's Chancery Cases, 179.]

THE plaintiff is the only surviving child of William Wynne, who was the only son of John Wynne. John Wynne, by will dated in 1773, gave some pecuniary legacies, and then went on as follows: "And as I have lately received the melancholy account of the death of my dear son William Wynne, at Bengal, who has left a widow and two small children, and I am informed he died worth five times the fortune I shall leave behind me, which will be a handsome provision; and as I shall leave behind me, over and above the said legacies, only sufficient for a decent maintenance for my loving wife Mary Wynne, by whose prudence and economy I have saved the greatest part of the fortune I shall die possessed of, not doubting but that she will dispose of what shall be left at her death to our two grandchildren: all the rest and residue of my personal estate, goods, chattels, moneys in the stocks, plate, jewels, watches, and household furniture, and whatever else I shall be possessed of at the time of my decease, I give and bequeath to my loving wife Mary, hereby constituting and appointing her sole executrix." The testator died in September, 1775. The wife died intestate, July, 1781, and this bill was filed by the surviving grandchild, against her personal representative, for an account of, and to be paid such part of the estate of the grandfather, as remained undisposed of by the wife during her life. And the question was, whether these words made an absolute devise to the wife, or operated as a remainder over.

Mr. Mansfield, for the plaintiffs. The words "not doubting" are as strong as those made use of in any of the cases, such as "request" or "desire;" they express a thorough confidence. He cited 9 Mod. 122, not doubting she would be kind to his children. No objection was made to the force of the words "not doubting." The words in the Institute are *peto, rogo, mando, fidei tuæ committo*, and have always been held compulsory.

Mr. Hardinge, on the same side, cited *Harland v. Trigg*; *Harding v. Glyn*; *Eales v. England*; ¹ *Trott v. Vernon*.² There is no case where

proportions, or interest . . . as my said wife shall, in her discretion, see most fitting and proper").

In re Pinckard's Trust, 27 L. J. Ch. 422. See *Wright v. Atkyns*, Cooper, 121, 122; T. & R. 143; 17 Ves. 255; 19 Ves. 299; 1 V. & B. 313; Sugd. Law of Prop. 376, s. c. — Ed.

¹ 2 Vern. 466; s. c. Prec. Ch. 200.

² 1 Vern. 411; 100. 2 Ves. 61. 50. 50. 50. 50.

the word "desire" has not been held imperative, though there have been cases where the decree has been contrary, on account of the uncertainty of the person intended. The cases 2 Vern. 559, 10 Mod. 404, are too strong to argue from. That of Harland v. Trigg is quite out of the reason of this case; hoping he will continue them in the family is quite uncertain as to the persons. 2 Eq. Abr. 291.

Mr. Attorney-General, for the defendants, cited *Bland v. Bland*, in 1745, and *Birkhead v. Coward*.¹

LORD CHANCELLOR. If a bill had been filed in the lifetime of the wife, could I have ordered this money to be laid out, and that she should receive the interest for her life, and then it should go over? These are equivocal words, the intent of which is to be gathered from the context. If the intention is clear what was to be given, and to whom, I should think the words "not doubting" would be strong enough. But where, in point of context, it is uncertain what property was to be given, and to whom, the words are not sufficient, because it is doubtful what is the confidence which the testator has reposed; and, where that does not appear, the scale leans to the presumption that he meant to give the whole to the first taker. Here he looked upon the provision made by the father of the grandchildren as an ample provision, and meant this fortune to pass through the pleasure of his wife, leaving it to her to use what she pleased, and consequently to make the residue such as she chose. If he had meant imperatively, he might easily have used such words as would have effected his intention; but it is impossible, upon any rule of construction, to make these words an order upon her to pass the property over.

*Bill dismissed.*²

¹ 2 Vern. 116.

² *Atty.-Gen. v. Hall*, Fitzg. 314; 8 Vin. Abr. 456, s. c.; *Bland v. Bland*, 2 Cox, 349; *Sprange v. Barnard*, 2 Bro. C. C. 585; *Pushman v. Filliter*, 3 Ves. Jr. 7; *Cowman v. Harrison*, 10 Hare, 234, *accord*.

In *Cowman v. Harrison*, *supra*, Wigram, V. C., said, p. 239: "The next question is, whether, as a precatory gift, it is good. The rule as to such gifts is, that there must be a certainty of subject; and the foundation of that rule stands on very solid grounds. The right of a donee to spend the subject-matter of the gift is inconsistent with the nature of a trust; and the court therefore collects in that case that there can be no intention to impose a trust. The disposition is such that, if a trust were raised, it could not be enforced; and the court, therefore, will not impute to the testator an intention to raise it. Independently of principle, I think the authorities referred to by the defendants decide the question, and that the case falls completely within the class of cases in which the testator makes a gift of so much as shall be left at the decease of a person to whom he has given the use of the thing referred to." — ED.

PETER PIERSON, ESQ., RESIDUARY LEGATEE OF JOHN GARNET,
v. RACHEL GARNET, SPINSTER, ONLY SISTER AND HEIR-AT-
LAW OF JOHN GARNET, AND OTHERS.

IN CHANCERY, BEFORE SIR LLOYD KENYON, M. R., FEBRUARY 10,
MARCH 6, 1786.

[*Reported in 2 Brown's Chancery Cases, 38.*]

JOHN GARNET, late Lord Bishop of Clogher, by his will dated 12th October, 1780, gave his personal property to Samuel Salt, Esq., in trust, to pay to several of the defendants annuities stipulated in his said will, and went on as follows: "And, subject to the said annuities, it is my will that the said Samuel Salt, his executors, administrators, and assigns, shall and do pay, or permit and suffer, my kinsman, Peter Pierson, of the Inner Temple, London, Esq., to receive the whole of the residue of the proceeds, interest, and profit of the said fund so to be placed out at interest, after the payment of the said annuities, for and during the term of his natural life, with the full benefit of the said annuities, if they or any of them shall cease during his life; and, from and after the death of the said annuitants, I bequeath the said residue to the said Peter Pierson, his executors, administrators, and assigns: and it is my dying request to the said Peter Pierson, that, if he shall die without leaving issue living at his death, that the said Peter Pierson do dispose of what fortune he shall receive under this my will to and among the descendants of my late aunt, Anne Coppinger, his grandmother, in such manner and proportion as he shall think proper."

The principal question¹ was, whether the terms used in the recited clause were recommendatory only, or imperative, and raised a trust for the descendants of Anne Coppinger.

There were three accessory questions.

The reporter did not hear the opening for either the plaintiff or defendant, but understands that it was argued by Mr. Ambler, Mr. Scott, and Mr. Clifford, for the plaintiff; Mr. Price, Mr. Selwyn, Mr. Robinson, and Mr. Graham, for the defendants, to the general effect following:—

With respect to the first and most material question, the plaintiff's counsel contended that the words were merely recommendatory. Mr. Ambler and Mr. Scott attempted to argue upon the interpretation of these words, as being equivalent to *peto, rogo, fidei tuæ committo*; insisting that the words "dying request" amounted only to an earnest wish

¹ Only so much of the case is given as relates to this question.

of the testator, but nothing further; that they were not strong enough to raise a trust according to the notions of the civil law.

His Honor seeming inclined to lay out of the case the civil law, wished it to be argued upon the principles laid down in former cases. The counsel, in consequence of this, contended that the rule laid down and adhered to by the court was, that there must be a certainty of the gift and of the object to whom it is given. As to the gift itself, it was sufficiently marked; but as to the objects, there could be no certainty whatsoever. It was difficult to decide whom the testator meant by descendants; whether those that were living at the time of making his will, at his own death, or those born after, or those who should be *in esse* at the death of Peter Pierson: it was so difficult to determine who the particular persons intended were, that it would be impossible to decide the question.

His Honor seemed inclined to defer the question as *prima facie*, there seemed to be no occasion to go into it, until Peter Pierson should be dead without issue; but, being much pressed to decide, by the suggestions of plaintiff's counsel, of the disagreeable situation in which the plaintiff stood, not knowing how to treat this property, or how to settle or dispose of it, without the direction of this court, his Honor waived his opinion, and consented to determine it. Mr. Scott said that the will itself afforded an argument in favor of the plaintiff; that the interest and dividends of the residue, after payment of the annuities, were given to Peter Pierson for his natural life; and then, after all the annuitants were dead, the capital was given to him absolutely. The counsel cited the cases of *Harland v. Trigg* and *Wynne v. Hawkins*. In *Harland v. Trigg* the word "family" was said to be a word of uncertainty; so is the word "descendants;" as to *Wynne v. Hawkins*, the words "not doubting" were held insufficient to create a trust. With respect to *Nowlan v. Nelligan*,¹ the property was not given to the holder of the fortune, but to the executors themselves. They also cited *Hob. 33, 2 Eq. Abr. 291*, *Bland v. Bland*, 1745, *Le Maitre v. Bannister*, Nov. 26, 1770, where the testatrix gave her fortune to Captain Roach, and, if he should die without issue, then she recommended it to him to do justice to her daughter, if he should think her worthy of it; but, if any unforeseen accident should make the whole acceptable or serviceable to him, he may dispose of it if he should think fit. It was held not to be an imperative bequest. In the present case, if Peter Pierson is not to have the absolute disposal, the bequest is nugatory; though it is given to him, his executors, administrators, and assigns, it is impossible for him to use it as his own. The apparent clause upon the will is so absolute that the court cannot force a trust upon the legatee.

Mr. Price, Mr. Selwyn, Mr. Robinson, and Mr. Graham, for the de-

fendants, insisted that this case was totally different from all the authorities cited; in all of them the power was in the first taker. If the matter were *res integra*, it might be very proper to resort to the Roman code; but in the present state of judicial decisions, such a reference was totally unnecessary. That the words used here are sufficiently strong to create a trust, appears from the cases of *Eales v. England*,¹ *Harding v. Glyn*, *Buggins v. Yeates*.²

With regard to the uncertainty of the objects, the descendants are undoubtedly all those who shall be living at the death of Peter Pierson, without issue, as in the case of *Baldwin and Carver*.³ They may divide the property among them; the power left to Peter Pierson is apparent, and he may execute it without difficulty. With respect to the absolute gift to Peter Pierson, the preceding clause only gives it to him for life, and is a mark of the intention to control this property.

Mr. Ambler, in reply. Then as to the words, whether they are sufficiently imperative to raise a trust. In order that they should be sufficient for that purpose, the intention must appear either by the words themselves, by the object to which the testator applied them, or upon the face of the will. There has been no case determined on these words, "it is my dying request." The word "request" denotes free will in the person taking the legacy. It is rather a stronger word than "desire," but still leaves it in the breast of the party taking to do the act or not. It would be extraordinary if such words should be construed as if he had raised an express trust. The cases upon the subject are *Harland v. Trigg*, *Wynne v. Hawkins*, *Bland v. Bland*, *The Countess of Bridgewater v. The Duke of Bolton*.⁴

As to the purposes of such a trust, they will make a difference in the construction; for, where such words occur, and the purpose is for the payment of debts, it is held a trust, the object making it so. In such a case, even the word "recommend" will constitute a trust; but the objects here are the descendants of Mrs. Coppinger, who are very numerous, many of them unknown to the testator, and of whom many more may be born during Mr. Pierson's lifetime. They are not objects of the testator's bounty; he has left it in Mr. Pierson's discretion what proportion he will give to each. This leads to the consideration whether it appears, from the whole will, to be the testator's intention to raise a trust.

In *Cunliffe v. Cunliffe*,⁵ before the commissioners in 1770, it was a devise of a sugar-house to the testator's nephew, Ellis Cunliffe, and, in case his nephew should die without issue, the testator recommended it to him to give it to his brother. The court was of opinion that it

¹ 2 Vern. 466; Prec. Ch. 200.

² 9 Mod. 122.

³ Cowp. 309.

⁴ 1 Salk. 326.

⁵ 11 Ves. 222.

was not sufficient to raise a trust. It is true, it has been said, that in that case the question turned upon the word "recommend;" but I say, it was upon the general circumstances of the case; for the word "recommend" would have been sufficient had the trust been for the payment of debts.

Bland v. Bland, in 1745, shows that wherever the first gift is of the absolute property, such a recommendation following it shall not raise a trust. In that case, Lady Bland gave the estate in question to Sir John Bland, and earnestly requested that, in case he should die without issue, he would dispose of the estate, or of so much thereof as he should die seised of, so that the estate might be enjoyed by her daughter. It was held to be no trust, inasmuch as the words, "so much as he should die seised of," showed he might dispose of the whole; and that it was like the case of *Attorney-General v. Hall*.¹ In both these cases the whole was given absolutely; and, in this case, the whole is given absolutely and emphatically to Pierson. It is not doubtful that he meant to give the whole; for he has mentioned his executors, administrators, and assigns. Nothing remained in the testator to be given over. In *The Countess of Bridgewater v. The Duke of Bolton*, the devise was to the devisee, to be given by him to his children, if he should think proper: it was held to be a fee in the devisee. In the present case, it was highly improbable that the testator meant a trust. Mr. Pierson appears to be the sole, or at least the chief, object of his bounty. He was with him in Ireland, and had been abroad with him, and the testator had taken him from the profession of the law; but, if Mr. Pierson should have no children, it was then the testator's wish that he should dispose of it among the descendants of Anne Copping, many of whom the testator could not know, and many might be born during Mr. Pierson's lifetime.

The Lord Chancellor, in — *v.* —, laid great stress on the testator's having given legacies to the persons for whom the trust was to be raised. In this case, the testator has not directed Mr. Pierson to give any specific sum to any of them. Here is no trust in Mr. Pierson, in case he should have children. It is extraordinary there should be a trust if he had not, and none if he had. The construction will make the testator act absurdly; for, having a regard to Mr. Pierson, he will have given him no power to make a settlement. Upon the death of the annuitants, on this construction, the trust in Salt will expire; but a new trust will commence in Mr. Pierson, in case of his dying without issue. Another reason against this operating as a trust is the uncertainty and impracticability of the devise. I do not mean an uncertainty in the words, which are just as certain as "family" or "relations;" but an uncertainty in point of execution as a trust. It

¹ Fitg. 314.

is from this sort of uncertainty that the court has always said the word "relations" shall mean next of kin. In this case, the persons will be equally numerous and uncertain; it, therefore, could not be intended as a certain trust. The word "family" has been held, in *Harland v. Trigg*, to mean nobody. In *Wynne v. Hawkins*, Lord Thurlow said he had decided that case upon the uncertainty of the object. There is no case where the word has been "descendants," except one,¹ where its signification was laid down by the additional words, "living near Seven Oaks in Kent." So, in General Honeywood's case,² the words were relations "who should claim within two years." With respect to the impracticability of the devise, it is sufficient to show that it may be impracticable. Who are the objects? The descendants living at the making of the will, at the death of the bishop, or of Mr. Pierson? If at the making of the will, or the death of the bishop, are they to be entitled upon surviving Mr. Pierson? In order to be construed a trust, it must be such a one as Mr. Pierson could execute without the assistance of a court of equity: yet here Mr. Pierson is expected to find out all the descendants, and to give something to every one of them. If he cannot execute the trust, it never could be intended as such. Suppose Mr. Pierson should make no disposition, is the whole world to be searched over for descendants of Anne Coppinger? There is another difficulty: he is under the necessity of giving something to every one; if he does not, the whole will be void. *Menzey v. Walker*.³ If it was among the descendants of his grandfather, it would be the same thing. In *Eales v. England*,⁴ the first taker had only an estate for life given to him. In *Harding v. Glynn*, it was clearly a power; it was to give it to such of his relations as she should approve. *Nowlan v. Nelligan* is not like this; the property was given to the trustees, not to the tenant for life.

MASTER OF THE ROLLS. As to the first question arising upon this will, namely, whether the clause is to be considered as imperative upon Pierson, so as to create a trust, if it is one of those duties of imperfect obligation (as the civilians term them) which bind the moral character of men, but where courts of justice cannot interfere, it will not entitle me to do it, or to go beyond those rules which have bound courts of justice. It is better to go upon the principles by which others have decided, than to vary from them by spelling out little circumstances in a case, as the ground of determination. The principles appear to be those which are recognized by Lord Thurlow in the cases of *Harland v. Trigg* and *Wynne v. Hawkins*, that where the property to be given is certain, and the objects to whom it is given are certain, there a trust is to be created. And it would be a lamentable case if this

¹ *Crossley v. Clare*, 11 April, 1761.

² *Ambler*, 708. *Vide* 1 Bro. C. C. 33.

³ *Wentworth*, 70.

⁴ *Deane*, 100.

court were to raise a distinction upon slight words, such as *peto, rogo, fidei tuæ commendo*, and such expressions of the civil law; and if the decisions of cases were to turn upon such grounds, property would be very vague. The principles were not first laid down by Lord Thurlow, but extracted by him, with great wisdom, from those on which preceding chancellors have decided questions of this nature. I wish to refer to a case which I have not heard cited, *Richardson v. Chapman*, which was first heard before Lord Northington, and afterwards in the House of Lords.¹ It is accurately stated in 1 Burn's Ecclesiastical Law, tit. Bishops, which says that in this court a request in a will is, at this day, imperative; "but there ought to be a particular person named and pointed out." Let us see whether this rule be supported by the cases, or whether it be impugned by any. It is sufficient to refer to *Harland v. Trigg* and *Wynne v. Hawkins*. With respect to the other cases cited, there is one very apposite to the question; it is *Palmer v. Scribb*,² where similar terms to those used in this case were held too general to amount to a devise. Though this book is not a book of the first authority, I must be guided by such cases as stand in point there; and particularly by a case which contains so much sense as induces me to rely upon it, in conjunction with the other authorities. With respect to the authorities cited on the other side, *Bland v. Bland* falls within the rule. The property was not certain, being the whole of what he should be seised of at his death, and leaving him an absolute control over the property during his life. The case of *Cunliffe v. Cunliffe* breaks in upon my opinion; and, I admit, the decree I shall pronounce is in contradiction to it. It would be absurd to lay a stress upon "recommend" in the one case, and not upon "it is my dying request" in the other. The ground upon which I get rid of that case is, that the Lords Commissioners, in delivering their opinion, rested upon *Bland v. Bland*, and upon *Pynsent v. Pynsent*. This latter is not found, but, upon the note we have of *Bland v. Bland*, we may say that case was not like *Cunliffe v. Cunliffe*. Certainty of the property, though one of the *sine qua nons*, was wanting. As to *Glynn v. Harding*, it goes the whole length of the present case. The reasons are not fully reported by Atkyns, but the words were, "I desire," and they were held imperative. Therefore, where the circumstances, of certainty of the property, and of the object to whom it is given, concur, all the cases warrant me in saying it is a trust, except *Cunliffe v. Cunliffe*, which cannot be relied upon, for the reasons mentioned. In *Le Maitre v. Bannister*, the words were, "to do justice to A. and her children; but, if any circumstances should occur to make it necessary, the devisee was to be at liberty to dispose of it." There, one of the circumstances was wanting; for the devisee could dispose during his life. Mr. Ambler has

¹ 5 Bro. Parl. Cas. 400.² 2 Eq. Abr. 291.

pressed the difficulty and impracticability of carrying the trust into execution. That argument has no weight with me; because, if an express trust had been raised, it must have been executed, though it would have been attended with all the same difficulties and impracticabilities stated in this case. However arduous the trust was, the court must have carried it into execution. The argument that, being once given, it cannot be given over, upon the reason that a fee cannot be mounted upon a fee, is begging the question; for words creating a fee have, in innumerable cases, been cut down, by subsequent words, to an inferior estate. I think no stress can be laid on the words "executors, administrators, and assigns;" it would be equally reasonable to lay stress upon the former express estate for life. These reasons and authorities induce me to pronounce that the words are imperative, and create a trust in favor of the descendants of Anne Coppinger.¹

¹ Affirmed by Lord Thurlow, 2 Bro. C. C. 226, who delivered the following opinion: "I see no great reason to doubt the propriety of the rule laid down by the Master of the Rolls. Where the object and the person are both certain, the rule must be adhered to. *Harland v. Trigg*. The only question in *Cunliffe v. Cunliffe* was, whether it fell within the rule. Where the words '*peto, rogo, opto, des,*' &c., occur, they make a designation of the object, and the property must be applied according to that designation. In this case, the devisee only takes an estate for life in the produce of the fund. The intention of the testator was, that, if he had children, he should take an absolute power of disposal; if not, it should go to the descendants of his aunt. If the word used had been '*relations,*' it would go to those within the Statute of Distribution (*Green v. Howard*, 1 Bro. C. C. 31, and notes); but, under these words, it would go only to such relations as are descendants, which is still more limited. The decree is right; for the devisee may obtain an absolute power, and then there will be an end to it."

In the following cases the language was held to be mandatory, and therefore to create a trust:—

Burrell v. Burrell, Amb. 660; *Mason v. Linbury*, cited in Amb. 4 and 2 Ves. 67 ("I give to my brother, Robert Mason, £2,000, which I desire him, at his death, to give to his son and his children, and to the children of his late daughter, as he should think fit").

Massey v. Sherman, Amb. 520 (Devise of copyhold to his wife in fee, "not doubting but that my wife will dispose of the same to and amongst my children, as she shall please").

Richardson v. Chapman, 7 Bro. P. C. (Toml. ed.) 318.

Parsons v. Baker, 18 Ves. 476 (Devise to a nephew, "not doubting, in case he should have no child or children of his own body, but that he will dispose and give my said real estate to the female descendants of my sister, Deborah Parsons, of Kemerton, widow, in such part or parts and in such manner as he shall think fit, in preference to any descendant on his own female line").

Walsh v. Wallinger, 2 Russ. & M. 78 (Devise of residue "unto his said wife, to and for her own use and benefit and disposal, trusting that she would thereout provide for and maintain his family, and particularly his eldest son; and, at her decease, give and bequeath the same to her children by him, in such manner as she should appoint").

Gully v. Cregoe, 24 Beav. 185 (Devise to a wife, "for her own sole use and ben-

MALIM v. KEIGHLEY.

IN CHANCERY, BEFORE SIR RICHARD PEPPER ARDEN, M. R., JUNE 7,
1794.

[*Reported in 2 Vesey, Jr., 333.*]

THOMAS LOWE, by his will, gave £1,000 stock in trust to pay the interest and dividends to his daughter Anne Malim for life, for her separate use, and after her decease the principal among her children; if no children, to sink into the residue. He gave £500 stock to Elizabeth Thompson, and a similar sum to Sarah Lowe, two other daughters; and declared trusts, in failure of which those sums should sink into the residue. Then he gave all the rest and residue of his estate and effects whatsoever and wheresoever in trust, as to one-third for his daughter Lucy Rawlin, for her separate use for life; after her decease for her husband for life, and after his decease for the children; as to another third, for Elizabeth Thompson, for her separate use for life, and after her decease for her children, with a proviso that, if she should survive her husband, and marry again, she might, by writing under her hand and seal, executed before such marriage in the presence of two witnesses, direct the interest, &c., to be paid, after her decease, to such husband for life; as to the other third, for Sarah Lowe and her children in the same manner, and with a similar power in case of her marriage; and, in case either of these daughters should leave no children, the share of such daughter was to go to the other two daughters in the same manner, as their respective funds.

“And, in case the whole of the residue of my personal estate shall become vested in any one of my said daughters, then I do give and bequeath the same after the expiration and determination of the several trusts beforementioned, unto such surviving daughter, her executors and administrators, hereby recommending it to such daughter to dispose of the same after her own death, and the determination of the several trusts aforesaid, unto and among the children of my said daughter Anne Malim and my nephew John Lowe, of Ferry Bridge, — desiring that his reputed daughter Emilia, though born before marriage, may be considered as one of his children.”

The whole residue became vested in the testator's daughter Sarah, of the same fairly, justly, and equitably amongst my two daughters and their children”).

Shovelton v. Shovelton, 32 Beav. 143 (Bequest of residue “unto my said dear wife, to and for her own absolute use and benefit, in the fullest confidence that she will dispose of the same for the benefit of her children, according to the best exercise of her judgment, and as family circumstances may require at her hands”). — ED.

who married Keighley ; and the question was whether, after her decease without issue and intestate, a trust arose for the children of Anne Malim and John Lowe.

Mr. Lloyd, for the children of Malim and Lowe, plaintiffs. This was determined in *Pierson v. Garnet*, which overturned *Cunliffe v. Cunliffe*.¹

Mr. Graham and *Mr. Abbott*, for the defendant. There was no occasion to get rid of *Cunliffe v. Cunliffe*, in order to make that decision ; and what the Master of the Rolls says upon the word "recommend" is extra-judicial. There is a marked distinction between that word and "desire" or "request." The argument on this point always begins by saying, whether the clause is recommendatory or imperative. The court must go on the distinction between the words, which sometimes may be very fine. "Recommend" does not imply volition, but advice. *Ex vi termini*, it leaves the party to decide. The person recommending may be extremely indifferent about it. The testator could not mean by this recommendation the same thing as when he created a power by express words. The word comes from the French ; but if from the Latin, *commendo*, it means "I divest myself of all discretion, and put it entirely into your hands." From *Le Maitre v. Bannister*, 26th November, 1770, it is plain the word "recommend" will admit a qualification, and does not absolutely impose an obligation. It has tacitly in it the qualification that the caution of the party in that case added ; and, if the party can give it that sense, the court may. Suppose, in *Pierson v. Garnet*, where the word was "request," the will had gone on to say, "if he shall so please." *Bull v. Vardy*² shows it is extremely important to show the effect of the particular words used.

MASTER OF THE ROLLS (SIR RICHARD PEPPER ARDEN). I think, with Lord Kenyon, that *Cunliffe v. Cunliffe* is overruled ; that he meant to say he differed from the Lords Commissioners, and that he should be of the same opinion if the word had been "recommend." The question is, whether there is any difference between "recommend" and "it is my dying request," — whether the former is not equal to the latter. If I was deciding upon the weight of the words, I rather think "recommend" is stronger than "desire." A great stress is laid upon the word "dying ;" but every request by will is a dying request. I will lay down the rule as broad as this : wherever any person gives property, and points out the object, the property, and the way in which it shall go, that does create a trust, unless he shows clearly that his desire expressed is to be controlled by the party, and that he shall have an option to defeat it. The word "recommend" proves desire, and does not prove discretion. If a testator shows his desire that a thing shall be done, unless there are plain, express words or necessary implication that he does not mean to take away the discretion, but intends to leave

it to be defeated, the party shall be considered as acting under a trust. I will not criticise upon the words. "Recommend" is a request, and more. If I request a man to do anything, I recommend it; and *vice versa*. I do not know how to distinguish them; therefore declare that the residue of the personal estate upon the death of Sarah Keighley without issue, and intestate, became a trust for the children of Anne Malim and John Lowe, in equal shares and proportions.¹

GIBBS v. RUMSEY.

IN CHANCERY, BEFORE SIR WILLIAM GRANT, M. R., DECEMBER 3, 6, 1813.

[*Reported in 2 Vesey & Beames, 294.*]

ANN CLARKE, by her will, dated the 12th of December, 1809, having given to her executors her household goods, watches, trinkets, plate, and wearing-apparel, to be disposed of to such persons and in such proportions as they, or the survivor of them, should in their or his discretion think proper, devised and bequeathed her freehold, copyhold,

¹ Affirmed by Lord Loughborough, 2 Ves. Jr. 529.

In the following cases the language was held to be mandatory, and therefore to create a trust, or power in the nature of a trust: *Eeles v. England*, 2 Vern. 466; *Prec. Ch.* 200, s. c. (Bequest of £300 to R. H., "but my will and desire is that he will give the said £300 unto his daughter Susan at the time of his death, or sooner, if there be occasion for her better advancement and preferment").

Clifton v. Lombe, Amb. 519 ("In consideration that Lady Lombe has promised to give what I shall give her to her and my children at her death, I give her," &c.).

Bute v. Stuart, 1 Bro. P. C. (Toml. ed.) 476; *Tibbits v. Tibbits*, 19 Ves. 656; *Jac.* 317, s. c. (Devise to a son, "And I do hereby recommend to my said son to continue his cousins J. T. and R. T. in the occupation of their respective farms in the county of Warwick, as heretofore, and so long as they continue to manage the same in a good and husbandlike manner, and to duly pay the rents").

Horwood v. West, 1 S. & S. 387 (Testator gave everything by will to his wife, and recommended her by her will to give what she should die possessed of to certain persons named).

Baker v. Mosley, 12 Jur. 740 (Bequest to A., "trusting that he would preserve the same, so that after his decease it might go to and be equally divided between his then present son and three daughters by his late wife Alice").

Ford v. Fowler, 3 Beav. 146 (Bequest to a daughter, "And I recommend to my said daughter and her said husband that they do forthwith settle and assure the said sum, together with such sum of money of his own as the said husband shall choose, for the benefit of my said daughter and her children").

Wace v. Mallard, 21 L. J. Ch. 355 (Testator gave his entire property to his wife, "in full confidence that she will, in every respect, appropriate and apply the same unto and for the benefit of all my children").

See *Nowlan v. Nelligan*, 1 Bro. C. C. 489. — Ed.

and personal estate to Henry and James Rumsey, their heirs, executors, administrators, and assignes, upon trust to sell; and out of the money to arise by such sale, together with all her ready money, &c., and all other her estate and effects, she bequeathed several legacies; and among them £100 to each of her trustees for their care and trouble; and giving all her books to Henry Rumsey, to be retained by him, and divided amongst such of her friends as he should think proper, proceeded thus:—

“I give and bequeath all the rest and residue of the moneys arising from the sale of my said estates, and all the residue of my personal estate after payment of my debts, legacies, and funeral expenses, and the expenses of proving this my will, unto my said trustees and executors (the said Henry Rumsey and James Rumsey), to be disposed of unto such person and persons and in such manner and form and in such sum and sums of money as they in their discretion shall think proper and expedient. And I do hereby declare my will and mind to be, that in case my said freehold, copyhold, and leasehold and personal estates hereinbefore mentioned shall fall short or not be sufficient for payment of all the said several legacies and bequests, sum and sums of money by me hereby given and bequeathed, that what shall fall short shall be proportionably abated out of each legacy or sum of money hereby given and bequeathed.” And she appointed Henry and James Rumsey her executors.

The personal estate being insufficient to pay the debts, the real estate had been sold; and the questions were: 1st, Whether the executors, or the heir-at-law, or the next of kin of the testatrix were entitled to a sum of £1,095 8s. 4d., the surplus arising from the sale of the real estate; 2d, Who was entitled to the sum of £530, the amount of the charitable legacies admitted to be void by the statute.¹

Mr. Leach and *Mr. Cullen*, for the heir-at-law, contended that this could not be distinguished from *Morice v. The Bishop of Durham*; the residuary clause creating a trust, the subject being the produce of real estate, must, according to *Ackroyd v. Smithson*,² belong to the heir.

Mr. Roupell, for the next of kin, observing that the executors throughout this will are clothed with the character of trustees, argued that the residue was personal estate; that there was a partial intestacy; and therefore the next of kin were entitled, according to the Statute of Distribution.

Mr. Richards and *Mr. Stephen*, for the executors. The case of *Morice v. The Bishop of Durham* was clearly a trust; and the bishop in his answer disclaimed any beneficial interest. These defendants are trustees for the specific object alone of paying the debts and legacies. In effect the residue is absolutely given to them. The term “discretion”

imports merely such disposition as they themselves shall think fit; excluding the discretion of any other person. Considered as a power, it may be exercised in their own favor; and if not exercised, the property belongs to them; in either way excluding both the heir-at-law and next of kin. This is not to be distinguished from the case in *Rolle*,¹ a devise to B. to dispose of at his will and pleasure; which words pass a fee.² A general power of disposition implies the absolute interest, as necessary to the exercise of the power. The word "trustees" in the residuary clause is merely *descriptio personarum*, not of their character. In principle this case is analogous to *Rogers v. Rogers*³ and *Dormer v. Bertie*.⁴

THE MASTER OF THE ROLLS. It is clear that such part of the real estate as is given to charitable purposes belongs to the heir-at-law, and does not go either to the next of kin or the residuary legatee. The question then is as to what is not otherwise disposed of than by the residuary clause, which turns upon the point whether there is any trust imposed by that clause: if there is, they cannot take beneficially, though the trust may be of so indefinite a nature that the court cannot carry it into execution. This testatrix, having created a trust to sell, gives many particular legacies, and among them £100 to each of her two trustees for their care and trouble in the execution of the trusts of the will. That is undoubtedly sufficient to exclude any claim as executors;⁵ but they claim, not in that character, but under a direct disposition to them as residuary legatees. The first words of the residuary clause amount clearly to an absolute gift to them; as the mere circumstance of giving them the description of trustees and executors cannot make them trustees as to that part of her property expressly bequeathed to them. Then do the subsequent words import trust? The testatrix has very frequently in the course of her will used the words "in trust;" but those words are not introduced here: "to be disposed of unto such person and persons, and in such manner and form, and in such sum and sums of money, as they in their discretion shall think proper and expedient."

I see nothing here but a purely arbitrary power of disposition according to a discretion which no court can either direct or control. It is not to be contended that, if the words were "to be disposed of according to their discretion," that would have qualified the preceding gift; then the effect must be produced, if at all, by the interposed words, "to such person or persons, and in such manner and form, and in such sum and sums of money;" but those are words perpetually

¹ 1 Roll. 834, l. 12, R. Mo. 57; Bend. pl. 9.

² See Comyns's Digest, tit. Devise, N. 4.

³ 3 P. Wms. 193.

⁴ Pr. Ch. 94.

⁵ *Langham v. Sandford*, 17 Ves. 435, and the references in the note (a), 443.

occurring in general powers of appointment; and it was never conceived that such words, instead of conferring a power, raised a trust. If that were so, there would be no such thing as good general powers of appointment. They would be all void trusts; for, if trusts at all, they must be void from the uncertainty of the objects.

In the case of *Morice v. The Bishop of Durham*, there was an express trust to pay debts and legacies, and dispose of the residue, as therein mentioned; and that was treated by the Lord Chancellor, as it had been here, as a case of express trust; and the Lord Chancellor very clearly states the distinction between express trust for an indefinite purpose and those cases where, from the indefinite nature of the purpose, the court concludes that a proper trust could not be intended, — though words may have been used which, had the objects been definite, would by construction import a trust. His Lordship observes that the principle of cases of the latter description has never been held in this court applicable to a case where the testator himself has expressly said he gives his property upon trust.

Supposing this testatrix, after this gift to the executors, had requested them to give the residue to such persons and in such manner as they may think proper and expedient, there would have been no trust, notwithstanding the words, on account of the uncertainty of the object. It is said the testatrix meant the executors to give this property to somebody, and not to enjoy it themselves; but that might be said in every case of a bequest to give to objects not distinctly specified, and in every case of a general power of appointment. It would be necessary to show that these executors not only cannot enjoy it themselves, but have no right to appoint it to others; as, whether they have the absolute property or only a power to appoint the residue, still the claim of the heir or next of kin is premature, until it shall be seen whether any appointment will be made. It was insinuated in the argument that this was probably a secret trust for charity. If that were so, it would be void; but there is nothing in the case entitling me to form such a conclusion. Therefore, neither the heir nor the next of kin have a right to call upon the executors to account for this residue.¹

¹ In the following cases the words were held to create no trust, nor power in the nature of a trust: —

Robinson v. Dugate, 2 Vern. 181 (Bequest of £200, “to be at the disposal of his wife, in and by her last will and testament, to whom she shall think fit to give the same”).

Maskelyne v. Maskelyne, Amb. 750 (Legacy to a brother, “to be disposed of by him by his will as he shall see fit”).

Ex parte Payne, 2 Y. & C. Ex. 636.

Southouse v. Bate, 16 Beav. 132 (Bequest of income to B. W., “And at her death that she might leave it to her children, or whom she might choose.”)

Shenherd v. Nottidge. 2 Johns. & H. 766

RAIKES v. WARD.

IN CHANCERY, BEFORE SIR JAMES WIGRAM, V. C., MARCH 2, 7, 1842.

[Reported in 1 Hare, 445.]

THE will of George Raikes, dated the 15th of November, 1838, was as follows: "I give to my dear wife Marianne all my moneys, securities for money, goods, chattels, and personal estate whatsoever, to the intent that she may dispose of the same for the benefit of herself and our children, in such manner as she may deem most advantageous. And I make and appoint my said wife sole executrix of this my will." The testator died, leaving his widow (the said Marianne) and eleven of their children surviving. The bill was filed by the widow, for a declaration of the respective interests of herself and children in the personal estate of the testator, under the will. The children were defendants.

Mr. Temple and *Mr. G. L. Russell*, for the widow, argued that she was entitled absolutely to the entire residuary personal estate.¹

Mr. Boteler and *Mr. Faber*, for the defendants, contended that the bequest created a trust for the children. The authorities cited were *Sprange v. Barnard*,² *Andrews v. Partington*,³ *Cooper v. Thornton*,⁴ *Robinson v. Tickell*,⁵ *Hammond v. Neame*,⁶ *Hamley v. Gilbert*,⁷ *Curtis v. Rippon*,⁸ *Chambers v. Atkins*,⁹ *Benson v. Whittam*,¹⁰ *Blakeney v. Blakeney*,¹¹ *Taylor v. Bacon*,¹² *Wetherell v. Wilson*,¹³ *Woods v. Woods*,¹⁴ *Hadow v. Hadow*,¹⁵ *Jubber v. Jubber*,¹⁶ and 2 Roper, Tr. Legacies, 373.

VICE-CHANCELLOR, after stating the facts. The plaintiff seeks the direction of the court, but submits that she is entitled to the property absolutely. The defendants insist that the plaintiff, either wholly or to some extent, is a trustee for them.

In support of the plaintiff's case, it was argued, first, that the bequest to a person, the better to enable him to accomplish a given act or dis-

Ralston v. Telfair, 2 Dev. Eq. 255 (Residuary bequest, "to be disposed of as my executors think proper").

In *Buckley v. Bristow*, 10 Jur. n. s. 1095, Sir W. P. Wood, V. C., said (p. 1097): "Lord Cottenham does not appear to have been altogether satisfied with *Gibbs v. Rumsey*; and I apprehend no case would be decided according to it, where the gift is not precisely and distinctly in the words there mentioned." — Ed.

¹ The particular grounds which were the foundation of the arguments are distinguished in the judgment.

² 2 Bro. C. C. 588.³ 3 Bro. C. C. 60.⁴ 3 Bro. C. C. 186.⁵ 8 Ves. 142.⁶ 1 Swanst. 35.⁷ Jac. 354.⁸ 5 Madd. 434.⁹ 1 Sim. & Stu. 382.¹⁰ 5 Sim. 22.¹¹ 6 Sim. 52.¹² 8 Sim. 100.¹³ 1 Keen, 80.¹⁴ 1 M. & Cr. 401.¹⁵ 9 Sim. 438.¹⁶ 9 Sim. 503.

charge a given duty, vests the property in that person absolutely; and, secondly, that a bequest to a person in terms which, according to the language of the reported cases, are precatory only, in behalf of certain objects of the testator's favor, does not create a trust, unless the amount of the fund to which the precatory words apply is also certain; and that, where the legatee has power to dispose of the fund at pleasure, to an extent not defined by the will, no trust is created, but the property vests absolutely in the legatee. And it was said that the case before the court falls within the scope of both of the above principles.

On the part of the children, it has been argued that the words of this will are not within the scope of the cases upon which the former proposition depends. The will, it was said, clearly creates a trust in favor of the children of the testator, unless the latter proposition, relied upon by the plaintiff, prevents the court from executing it. And, with respect to the latter proposition, the defendants have argued that the relation in which the testator, the plaintiff, and their children stand to each other, is such that, according to the decided cases, the court has the power to measure the extent of the plaintiff's obligations to her children, and that this power reduces the interest of the children to that certainty which the court requires.

Of the reported cases which bear on the case before me, the first which I shall mention is *Burrell v. Burrell*,¹ where the gift was to the wife of the testator, "to the end she might give his children such fortunes as she should think proper, or they best deserve." The wife made an appointment by will; and one of the children being dissatisfied with it, filed his bill, insisting that the appointment was illusory. Lord Camden gave his judgment at large, and decided that the appointment was not illusory. From this case, it is clear that the bequest was not, at that day, thought to be an absolute gift to the wife; for, if that had been so, there would have been no question of illusory appointment. In the case of *Brown v. Casamajor*,² the bequest was of a sum of £7,000 to a father, "the better to enable him to provide for his younger children." The father consented to the order which was made for securing the capital, with liberty to the children to apply; and afterwards, upon petition, the interest was ordered to be paid to the father for his life. From the language of the Lord Chancellor in that case, it is clear, at that time, it was considered that the relation of parent and child was such that the court could, as between them, measure the extent of the trust. The case of *Hanley v. Gilbert*,³ shows that, where the maintenance of the objects of the testator's favor is one of the purposes of the gift, that is a benefit which is capable of being measured. *Thurston v. Essington*,⁴ also, does not exclude maintenance as a well-constituted trust. The words of the gift in *Broad v.*

Bevan¹ were very indefinite. "I give and bequeath to my daughter Ann, now living with me, the sum of £5 a year for her life, payable half-yearly by my executor. I also order and direct my son Joseph to take care of and provide for my said daughter during her life." And the testator made his son residuary legatee and executor. In that case, it was held that the daughter had a beneficial interest, and a reference was directed to the Master. I have a note of an unreported case of *Roberts v. Smith*, which was before Sir J. Leach, where the residuary real and personal estate was given to trustees, as to half, for the wife for her life, for the support of herself and the education of her children. The point, I believe, was not decided by the court; but Mr. Bell advised that a trust was created for the benefit of the children. *Wetherell v. Wilson*² is a very strong case. The interest of a fund was directed to be paid to the husband, in order the better to enable him to maintain the children of the marriage until their shares should become assignable to them. The husband assigned all his property to trustees for the benefit of his creditors; and it was held that there was a trust for the children, and, therefore, that the interest of the fund did not pass under the assignment. This, I presume, was on the ground that the court could measure the extent of the obligation which was imposed upon the husband by the words of the instrument. In all these cases, the court, without laying down any positive rule, has referred it to the Master to inquire of the extent and manner in which the intended gift should be applied for the benefit of the parties indicated.

It is true that the court has, in these cases, very commonly ordered the fund to be paid to the legatee. But, upon that point, the Lord Chancellor, in the case of *Woods v. Woods*,³ made important observations. The testator, after directing a sale of his property (if necessary) to pay his debts, said, "If sold, all overflush to my wife, towards her support, and her family, if any there be." The point argued upon demurrer was that the wife took absolutely. In that case the Lord Chancellor said, "It is clear that, if the contemplated event took place, a trust as between the widow and the children would be created. The cases which were cited to support the demurrer have no application to this point. They only decide that, where a gift is made to a person, and a trust created in that person, the court may safely and properly pay over the fund to the individual who is such trustee; but they are far from deciding that the person to whom the payment is so to be made in that character shall not be accountable for the fund to those for whose benefit the trust is created." "Now, I have already stated it to be my clear opinion that, in a certain event, — the event, namely, of a sale, — the widow would take the property subject to a trust, and that that trust would be not only for the eldest son, but also for the

¹ 1 Russ. 511, n. (a).

² 1 Keen, 80.

³ 1 Myl. & Cr. 401.

other members of the family." The Lord Chancellor, therefore, only said it was true that, where the fund was given to the parent to provide for the children, the fund might be safely paid to the parent;¹ but he decided that a trust was created for the benefit of the children.

In addition to those I have mentioned, there are the cases of *Chambers v. Atkins*,² *Foley v. Parry*,³ *Hadow v. Hadow*,⁴ *Jubber v. Jubber*.⁵ I cannot but consider these authorities as raising a formidable obstacle to the plaintiff's claim to an absolute interest in the property of the testator. At the same time, I have no hesitation in stating, that, to whatever extent the widow or family of Mr. Raikes may have an interest in his estate, after satisfying the paramount claims of creditors, the court will not deprive the widow of the honest exercise of the discretion which the testator has vested in her, or refuse its assistance to inquire into or to sanction any reasonable arrangements which she may desire to make. Further than this I cannot go in the present state of the cause.⁶

When the proper time for distributing the estate shall have arrived, it may perhaps deserve consideration (although I mean not to express any opinion upon the point) how far the late statute 1 Will. IV. c. 46, may have enlarged the power of Mrs. Raikes as between her and her children, supposing she should be held a trustee for them. The only decree I now can make is the usual decree for an account, in order to clear the fund.⁷

¹ *Cooper v. Thornton*, 3 Bro. C. C. 96, 186; *Robinson v. Tickell*, 8 Ves. 142; *Curtis v. Rippon*, 5 Mad. 434; *Jones v. Greatwood*, 16 Beav. 527; *Briggs v. Sharp*, L. R. 20 Eq. 317, *accord.* — ED.

² 1 Sim. & Stu. 382.

³ 5 Sim. 138. Affirmed on appeal, 2 Myl. & K. 138.

⁴ 9 Sim. 438.

⁵ 9 Sim. 503.

⁶ The bill was filed solely to obtain the declaration of the court upon the above point; and, after the argument, it appeared that the accounts had not been taken, and it was admitted that some debts remained unpaid. His Honor said, that, without laying it down as a general rule, in no case could the court safely declare the rights of the parties until the fund was cleared in respect of which the declaration was to be made; yet, in this case, although he had expressed his opinion on the point on which the parties desired his judgment, he would make no declaration until the fund was ascertained.

⁷ In the following cases it was held that the donee took beneficially, subject to an obligation in favor of a third person.

Hamley v. Gilbert, Jac. 354 (Gift to A. upon trust to pay certain moneys to a niece, which moneys "should be laid out and expended by her, at her discretion, for or towards the education of her son, F. G. H., and that she should not at any time thereafter be liable and subject to account to her said son, or to any other person whatever, for," &c.)

Foley v. Parry, 2 M. & K. 138; 5 Sim. 138, s. c. (Residuary bequest to testator's wife for life, remainder to a grand-nephew, W. W. F. "It is my particular wish and

superintend and take care of his education, so as to fit him for any respectable profession or employment").

Berkeley v. Swinburne, 6 Sim. 613 (Devise to trustees in trust for a sister's children, the trusts to vest upon the majority or marriage of each, the income to be paid to the sister (or guardian of the children) prior to the vesting, "to be applied in and towards the maintenance and education of such child or children respectively, or otherwise for their respective use and benefit").

Camden v. Benson, 4 L. J. Ch. N. s. 256 (Bequest of income to testator's wife during her life, "in support of herself and three children").

Woods v. Woods, 1 M. & Cr. 401 (Devise to a wife for the payment of debts, "all overflush to my wife, towards her support and her family, if any there be").

Hadow v. Hadow, 9 Sim. 438 (Devise to trustees upon trust to pay to testator's sons at twenty-one, and in the mean time to pay the income to "my said dear wife J. H., to be by her applied, or, in case of her death, to be applied by my said trustees . . . for and towards the maintenance, education, and advancement in life of my said sons . . . in such manner as she or they shall think proper").

Gilbert v. Bennett, 10 Sim. 371 (Devise to trustees upon trust to pay the income "unto my said wife for the education and advancing in life of any children she may have born by me . . . and after her death, the whole of the said property . . . to be divided equally . . . among my said children").

Page v. Way, 3 Beav. 20 (Settlement by F. J., upon trust to receive and pay income "unto or for the maintenance and support of the said F. J., his wife and children; or otherwise, if the trustees should so think proper, permit the same rents, &c., to be received by the said F. J. during the term of his natural life").

Wood v. Richardson, 4 Beav. 174 (Devise to a wife, "absolutely and at her own disposal, for the maintenance of herself and bringing up of my children").

Leach v. Leach, 13 Sim. 304 (Bequest of leaseholds to J. O., upon trust to pay an annuity of £200 to testator's daughter E., the wife of T. L., for life, afterwards to T. L., "to enable him to maintain and educate all and every the child and children of the said E., and for their advancement in life until the youngest should attain twenty-one;" and in case of T. L.'s death, upon trust for J. O., "to apply the same in like manner as T. L. was thereby directed to do").

Longmore v. Elcum, 2 Y. & C. C. C. 363 (Devise to A. in trust to permit testator's wife to receive the income "for her own use and benefit, and for the maintenance and education of my dear children so long as she, my said wife, shall continue my widow and unmarried").

Bowden v. Laing, 14 Sim. 113 (Bequest of income of certain property to testator's wife for life, "for the maintenance of herself and children").

Conolly v. Farrell, 8 Beav. 347 (Bequest to testator's wife for the use of his wife and daughter, subject to the trust "that his wife and daughter should live together, and that his wife shall take charge and see to the maintenance and support of his daughter during her minority, with the instruction of C.").

Costabadie v. Costabadie, 6 Hare, 410.

Crockett v. Crockett, 2 Phill. 553 ("All and every part of my property shall be at the disposal of my most true and lawful wife C. C., for herself and children").

Leigh v. Leigh, 12 Jur. 907 (Residuary devise upon trust to pay the income "unto my said wife so long as she shall continue my widow, for the purpose of enabling her to bring up, educate, and maintain my children").

Brown v. Paull, 1 Sim. N. s. 92 (Devise to trustees upon trust for his children when they should attain twenty-one, and in the mean time "to pay unto my said wife, or otherwise apply the rents and proceeds . . . for or towards their respective maintenance, education, and advancement").

Hart v. Tribe, 18 Beav. 215; 1 De G., J. & S. 418, s. c. (Bequest of £4,000 to a

wife "to be used for her own and the children's benefit, as she shall in her judgment and conscience think fit").

Carr v. Living, 28 Beav. 644 ; 33 Beav. 474, s. c. (Bequest of income to a wife for life, "for the maintenance and support of herself, and maintenance, education, clothing, and support of such child or children," &c.).

Scott v. Key, 35 Beav. 291 (Bequest to a wife, "to be at her sole and entire disposal for the maintenance of herself and such child or children as he might have by her").

Dixon v. Dixon, W. N. (1876), 225 (Testator gave annuities to his son and daughters, "for their own use and support of their children").

Cockrill v. Armstrong, 31 Ark. 580 (Bequest to sons, "having full confidence in my sons aforesaid, and in their disposition to deal fairly, justly, and liberally, I leave it to them to make proper and suitable provision for their sisters").

Bristol v. Austin, 40 Conn. 438 ("I give all my estate . . . to my beloved wife L., for her life, to be used in the support of herself and my children," with power to sell, &c.).

Hunter v. Stembridge, 12 Ga. 192 (Devise to a son and bequest of negro woman to a wife, "and I allow my son H. to give her a support off my plantation during her lifetime.") *Heard v. Sill*, 26 Ga. 302 ; *Cole v. Littlefield*, 35 Me. 439 (Bequest of income to a wife, "to be appropriated to the use of my beloved wife for her own and our children's support," &c.).

Tolson v. Tolson, 10 Gill & J. 159 (Devise to sons, "I request my seven sons above named to take care of their brother J. T.," &c.).

Chase v. Chase, 2 All. 101 (Devise upon trust to pay the income to a son, "for the support of himself and his family and the education of his children").

Warner v. Bates, 98 Mass. 274 (Bequest of income to husband for life, "in the full confidence that he will, as he has heretofore done, continue to give and afford my children such protection, comfort, and support as they or either of them may stand in need of").

Lucas v. Lockhart, 18 Miss. 466 (Devise to a wife during widowhood, "During . . . widowhood she is to have the entire use, profits, and control of my estate, and to her discretion do I intrust the education and maintenance of my children during that time." After the wife's death the children were to be supported out of annual profits of testator's estate).

Erickson v. Willard, 1 N. H. 217 (Devise to J. W., "I desire that the said J. W. should, at his discretion, appropriate a part of the income of my estate aforesaid, not exceeding \$50 a year, to the support of M. E.").

Ward v. Peloubet, 2 Stockt. 304 ; *Little v. Bennett*, 5 Jones Eq. (N. C.) 156.

Conf. Crockett v. Crockett, 5 Hare, 326 ("My last desire is, that all . . . my property shall be at the disposal of my . . . wife C. C., for herself and children"). But see 2 Phill. 553, s. c. *Loring v. Loring*, 100 Mass. 340 ("I give to my wife my personal property for her benefit and support and the support of my son, whilst she remains unmarried"), in which cases it was held that the donee took property in trust for herself and others in equal shares. See also *Godfrey v. Godfrey*, 2 N. R. 16, and *conf. Chambers v. Atkins*, 1 S. & S. 382.

In *Wetherell v. Wilson*, 1 Keen, 80 (Bequest of income to a husband, "in order the better to enable him to support, maintain, and educate" testator's children), it was held that the husband took no beneficial interest whatever.

In the following cases it was held that the donee acquired the property subject to a moral but not legal obligation towards third persons : —

him to assist such of the children of my deceased brother B. as he, the said A., may find deserving of encouragement").

Thorp v. Owen, 2 Hare, 607 ("I desire everything to remain in its present position during the lifetime of my wife, for her use and benefit. . . . I give the above devise to my wife that she may support herself and her children according to her discretion, and for that purpose").

Macnab v. Whitbread, 17 Beav. 299 (Devise to a wife "absolutely, and forever, in the full assurance and confidence and hope that she would bring up his children in the fear of God, and educate and provide for them, the same as it would have his intention, should it have pleased God to spare his life").

Byne v. Blackburn, 26 Beav. 41 (Bequest of income to a son-in-law during his life, "nevertheless to be by him applied for or towards the maintenance, education, or benefit" of the daughter's children).

Fox v. Fox, 27 Beav. 301 (Residuary devise to a wife, "to and for her own use and benefit, absolutely, having full confidence in her sufficient and judicious provision for my dear children").

Mackett v. Mackett, L. R. 14 Eq. 49 (Bequest to a wife, "to and for her own proper use and benefit forever . . . and the proceeds to be applied by her in the bringing up and maintenance of the said J. M., and all other the children of the said S. M.").

Greene v. Greene, 3 Ir. R. Eq. 90, 629 (Bequest to a wife, "well knowing her sense of justice, and love to her family, and feeling perfect confidence that she will manage the same to the best advantage for the benefit of her children").

M'Alinden v. M'Alinden, 11 Ir. R. Eq. 219 (Devise to a wife, "to be used by her in such ways and means as she may consider best for her own benefit and that of my three children").

See also *Brown v. Casamajor*, 4 Ves. 498.

Harper v. Phelps, 21 Conn. 257.

Spooner v. Lovejoy, 108 Mass. 529 (Residuary devise to a wife, "to her own use, and to be disposed of at her decease, according to the terms of any will that she may leave. She is, of course, to charge herself with the education and support of our daughters E., E., and M., so long as they shall remain unmarried").

Paisley's Appeal, 70 Pa. 153 (Bequest of income to wife for life, "for her support and the support and education of my children under the direction of my executors").

Biddle's Appeal, 80 Pa. 258 (Bequest of income to a wife during widowhood and minority of testator's children, "to be used and applied by her to the maintenance, support, and education of my children who may be under age, but without being called upon to give any account of the manner in which she may have applied it, as it is my wish that she shall have the absolute control of its use and disposition so long as she shall remain my widow").

Lesesne v. Witte, 5 S. C. N. s. 450 ("I devise all my estate to my beloved wife, feeling entire confidence that she will use it judiciously for the benefit of herself and our children").

Rhett v. Mason, 18 Gratt. 541 ("I devise all my estate . . . to my beloved wife B. C. M., for her maintenance and support, and for the maintenance and support of our children during her life and widowhood"). — *Ed.*

KNIGHT *v.* BOUGHTON.

IN THE HOUSE OF LORDS, MAY 1, 9, 15, 22, 23, 26, 30, 1843, SEPTEMBER 4, 1844.

[*Reported in 11 Clark & Finnelly, 513.*]

September 4, 1844. THE LORD CHANCELLOR.¹ The question in this appeal, which was argued before your Lordships in the last session, arose upon the will of the late Richard Payne Knight. He had succeeded to a large real estate and to considerable personal property under the will of his grandfather, Richard Knight. These, with other real estates and other personal property, he bequeathed "to his brother Thomas Andrew Knight, should he be living at the time of his (the testator's) decease, and if not to his son Thomas Andrew Knight the younger; and in case he should die before the testator, to his eldest son or next descendant in the direct male line; and in case he should leave no such descendant in the direct male line, then to the next male issue of the testator's said brother, and his next descendant in the direct male line; "but," he adds, "in case no such issue or descendant of my said brother or nephew shall be living at the time of my decease, to the next descendant in the direct male line of my late grandfather, Richard Knight, of Downton, according to the purport of his will, under which I have inherited these estates, which his industry and abilities had acquired, and of which he had, therefore, the best right to dispose." This property so bequeathed was given in fee.

The will, in a subsequent part of it, contained this clause: "I trust to the liberality of my successors to reward any others of my old servants and tenants, according to their deserts; and to their justice, in continuing the estates in the male succession, according to the will of the founder of the family, my above-named grandfather, Richard Knight."

The question is, whether, by the words "I trust to the justice of my successors in continuing the estates in the male succession," &c., a trust was created; or whether the testator intended to leave a discretion in the persons whom he calls his successors with respect to the disposal of their property. The law upon questions of this nature is well laid down by Lord Alvanley, in *Malim v. Keighley*. "Wherever," he says, "any person gives property, and points out the object, the property, and the way in which it shall go, that does create a trust, unless

¹ All that is material to the understanding of the case being contained in the judgment of the court, the rest of the case is omitted. — ED.

he shows clearly that his desire expressed is to be controlled by the party, and that he shall have an option to defeat it."

I have shared the doubt expressed by the Master of the Rolls, in his judgment in this case;¹ but I have come to the conclusion, upon considering the whole of the will, that the testator had no intention to create a trust; that no trust has in fact been created; and that it was in the discretion of the devisee, Thomas Andrew Knight, to dispose of the property as he should think proper. I do not think that the testator intended to control his successors in the disposal of the property, but to leave the whole to their discretion. In the very clause in question, the testator "trusts to the liberality of his successors to reward any others of his old servants and tenants, according to their deserts." This, it is clear, does not raise a trust: it creates no legal obligation; and when the testator, therefore, goes on and expresses his trust in "their justice, in continuing the estates in the male succession, according to the will of the founder of the family," it would be difficult to suppose that he intended to create a different description of obligation. He had himself suffered a recovery of the estate to which he had succeeded under the will of his grandfather, and thereby converted the entail into an estate in fee-simple. By his will he disposed of this to the nearest male descendant of his grandfather who should be living at his own death. He then gave him the power of acting as he himself had done in furtherance of his grandfather's view; and he might, and probably did, suppose that this mode of disposing of the property would be more effectual for that purpose than any special limitation of it that the law would permit.

Another observation arising out of the clause is, that it is not confined to his immediate successors, but is without limit. As he must have known that such an injunction could not be imperative on his successors generally, he must, I think, have meant it as a mere suggestion, applicable in the same way to his immediate as to his more remote successors, and not intending thereby to fetter their discretion as to the disposal of the property.

Another argument in support of this view arises out of the language of the clause as to the property to which it refers. It is not clear to what it applies. By the use of the word "continuing," it would seem to be confined to the estates which the testator took from his grandfather; but this is by no means clear. It is, doubtful, too, whether it includes the personal as well as the real estate. This vagueness is not inconsistent with the intention that everything should be left to the discretion of the successors, but is not easily reconcilable with the intention of imposing a positive obligation upon them.

This obscurity as to the property to which the clause was intended to

¹ 3 Beav. 175 *et seq.*

apply, and the circumstance that an indefinite portion of the personal estate was subject to be disposed of according to the liberality of his successors, raise another difficulty in the way of considering this as an imperative trust.

Then as to the nature of the estate to be taken in the property, supposing the property itself to be sufficiently ascertained, what is there to guide the court in determining it? The testator has said nothing upon the subject. This affords a further reason against the supposition that the testator intended to impose an imperative obligation on his successors as to the settlement of the property.

Referring, then, to the rule stated by the learned judge (Lord Alvanley) to whom I have referred, there is, I think, too much uncertainty in this disposition to admit of a trust being raised in the devise with respect to any part of the property in question; and, considering the terms that the testator has used, in connection with the other circumstances to which I have adverted, I am persuaded he had no intention to do so. I recommend your Lordships, therefore, to affirm this judgment.

LORD BROUGHAM. I heard the argument in this case; and I take the same view of it as that which has been expressed by my noble and learned friend. With respect to the precatory words, I had some doubt at first, but on further looking into the case these doubts have been removed; and, on the whole, I agree with my noble and learned friend in thinking that this judgment ought to be affirmed.

LORD COTTENHAM. I concur in thinking that the decree in this case ought to be affirmed. I adopt the rule as laid down by Lord Alvanley in *Malim v. Keighley*; and I think this case comes within the exception he there lays down. His words are thus reported: "Wherever a person gives property, and points out the object, the property, and the way in which it shall go, that creates a trust, unless he shows clearly that his desire expressed is to be controlled by the party, and that he is to have an option to defeat it." "If a testator shows his desire that a thing shall be done, unless there are plain, express words or necessary implication that he does not mean to take away the discretion, but intends to leave it to be defeated, the party shall be considered as acting under a trust."

I will not consider whether the testator has sufficiently described the property or expressed the way in which it should go; because, assuming that he has done so, I think there is sufficient upon the face of this will to show that he did not intend to take away from the devisee the discretion of defeating the devise he expressed. Having by his will expressed his sense of the justice of continuing the estate in the male succession, according to the will of his grandfather, it must be assumed that he conceived the obligation to be binding on himself; and how did he perform this duty? He had a brother, and that brother had

a son at the time he made his will ; but, so far from himself limiting the succession of the estates, according to the will of his grandfather, he gives absolute estates to his brother and to his brother's son, but only in the event of his brother not being alive at the time of his own death ; and he makes provision in terms for the next descendant in the male line of his grandfather, only in the event of there being no issue male of his brother at the time of his own death. Such next descendant in the direct male line of his grandfather was to take according to the purport of his (the grandfather) will ; but there was no such direction as to his brother or his brother's sons. He, no doubt, assumed that the sons of his brother and their issue male would, in due succession, enjoy the property ; but not doubting but that such would be the case, he took no means to secure it, unless the provision at the close of his will had that effect ; and if it had, all would have taken immediate interests in remainder under the will, and not absolute interests, such as he gave to his brother and his brother's son, in certain events.

It is an observation incident to all trusts created by precatory words, that the testator might, if he had intended, have created an express trust ; but there is a peculiarity in this case which seems to give peculiar force to that observation : the testator must have been aware of his own legal power over the property obtained by his own act (the recovery he had suffered) ; but he felt bound by a moral obligation to give effect to the supposed wishes of his grandfather. To effect that, he must have intended either to subject his successors to the same moral obligation, and so to effect his object through their acts, or to secure it by his own. The provisions of his will are precisely calculated for the first purpose, but are inapplicable to the second. An act which is to depend upon the sense of justice of another must be discretionary in the person from whom it is to proceed. In ordinary cases, the testator must be supposed either to have considered his recommendation as equivalent to a command or as imposing a condition upon the gift, — both of which exclude the idea of discretion, which is in the present case necessarily implied.

This construction is, I think, strengthened by the clause which relates to the donation he gave to the poor and others out of his estate. He intended that those directions should be imperative ; and with this view he declared “ that the person who should inherit his estates under his will should be his sole executor and trustee, to carry the same and everything contained therein duly into execution.” But apprehending that there might be some technical inaccuracies fatal to the legal validity of these gifts, he in that case expresses his “ confidence in the approved honor and integrity of his family to take no advantage of any such technical inaccuracy, but to admit all the comparatively small reservations he had made out of so large a property, according to the

plain and obvious meaning of his words," — terms very similar to those by which he expresses his wishes as to the line of succession to his estates, but very different from those in which he gives directions which he intended to be imperative.

I think, for these reasons, that the testator contemplated, and, in the words of Lord Alvanley, intended that the desire he expressed should be subject to the control of those who might succeed to his estates, and liable to be defeated at their discretion and option; and consequently that the judgment of Lord Langdale was right, and ought to be affirmed.

LORD CAMPBELL. Having been counsel in this case, I have regarded my own opinion upon it with a good deal of distrust, although that opinion was very strongly in favor of the decree; but now, having heard the opinions of the noble and learned Lords who have preceded me, I have no hesitation in saying that I do not entertain the smallest doubt that the decree was right, — feeling strongly that the testator had not the remotest notion that there was to be any resort to a court of justice to keep the estate in the family, but that those precatory words were considered by him as intimating what he desired that the settlement should be. I can hardly say that that is a strict settlement, because that is not at all the model on which such a settlement should be framed. It has caused great confusion in this particular case, and might tend, I think, to unsettle the law upon the subject. I therefore heartily concur in the motion that the judgment be affirmed.

The decree was accordingly affirmed, and the appeal dismissed.¹

¹ In the following cases the words were held to be precatory, and therefore to create no trust or power in the nature of a trust: —

Buggins v. Yates, 9 Mod. 122 (Testator did not doubt but his wife would be kind to his children).

Sale v. Moore, 1 Sim. 534 (Residuary bequest to a wife, "recommending to her, and not doubting, as she has no relations of her own family, but that she will consider my near relations . . . as I should consider them").

Bardswell v. Bardswell, 9 Sim. 319 (Bequest of everything to a son, "for his own use and benefit, well knowing he would discharge the trust the testator reposed in him by remembering the testator's sons and daughters").

Palmer v. Simmonds, 2 Drew. 221 (Residuary devise to a nephew, "for his own use and benefit, as I have full confidence in him that, if he should die without lawful issue, he will . . . leave the bulk of my said residuary estate unto the said W. F. S., J. S., and T. E. S. equally").

In re Bond, 4 Ch. D. 238 (Residuary bequest to a wife, "And for my dear wife, A. B., to do justice to those relations on my side such as she may think worthy of remuneration, but under no restriction as to any stated property, but quite at liberty to give and distribute what and to who my dear wife may please"). *Creagh v. Murphy*, 7 Ir. R. Eq. 182. — Ed.

BRIGGS v. PENNY.

IN CHANCERY, BEFORE LORD TRURO, C., JUNE 7, 9, 10,
NOVEMBER 7, 1851.

[*Reported in 3 Macnaghten & Gordon, 546.*]

THIS was an appeal by the defendant Sarah Penny, from a decree made by the Vice-Chancellor Knight Bruce, on the hearing of the cause, declaring that Frances Harley, the testatrix in the pleadings mentioned, for the administration of whose estate the suit was instituted, bequeathed the residue of her personal estate to the defendant as a trustee, for some purpose or purposes which the will and codicils of the testatrix did not disclose, and directing an inquiry whether the views and wishes of the testatrix concerning the disposition of such residue were declared by her by any instrument, paper, or writing, and if the Master should find that they were, then to report the same, but if he should find that they were not so declared, the decree directed the accounts to be taken, and the estate to be administered in the usual manner.

Frances Harley being possessed of considerable leasehold property, and money secured on mortgage of real and leasehold estates, and of other personal property to a large amount, made her will, dated the 13th of May, 1835, giving divers charitable and other legacies; among the latter she gave to Sarah Penny £3,000, "and a like sum of £3,000 in addition for the trouble she will have in acting as my executrix." The testatrix concluded her will by a devise and bequest in the words and manner following: "I give and devise all my real estates unto and to the use of the second son of the above-named Angelina Owen, his heirs and assigns for ever. And lastly, as to all the rest, residue, and remainder of my personal estate and effects, subject to and chargeable with the aforesaid several legacies and annuities, save and except such of them as are of a charitable nature, which I exclusively charge upon such part of said personal estate as by law I am empowered to charge therewith, and not out of any part of my lands, tenements, or hereditaments, I give and bequeath the same unto the said Sarah Penny of Great James Street, Bedford Row, her executors, administrators, and assigns, well knowing that she will make a good use and dispose of it in a manner in accordance with my views and wishes. And I hereby appoint the said Sarah Penny sole executrix of this my last will and testament, revoking all former and other wills by me at any time heretofore made, and declaring this alone to form my last will and testament."

On the 19th March, 1836, the testatrix executed a codicil altering certain of the bequests in her will; she also wrote a memorandum, to which there was no date, making other bequests. On the 25th November, 1848, she died, leaving her brother, the Earl of Oxford, her sole next of kin, who died on the 28th December, 1848, leaving the plaintiffs his sole executors, by whom his will was duly proved.

The plaintiffs, being advised that the will of the testatrix was incomplete and informal in respect of the disposition of her personal estate, opposed the probate; it was, however, ultimately granted of the will, codicil, and memorandum, to Sarah Penny as sole executrix. A great portion of the legacies and annuities bequeathed by the will having lapsed, the residue in the hands of Sarah Penny was very large, amounting to about £70,000; and this residue Sarah Penny claimed to be entitled to take beneficially.

The present suit was instituted by the executors of the Earl of Oxford, who insisted that the residue was held by Sarah Penny only as trustee for the next of kin of the testatrix, and that it formed part of the estate of the Earl. They submitted by their bill that, under the Act 1 Wm. IV. c. 40, Sarah Penny, being executrix, was thereby constituted a trustee of all undisposed-of residue on behalf of the next of kin, and could not take beneficially unless an intention to that effect appeared by the will,—which intention they denied, urging that a contrary intention appeared from the fact of the legacies given to her. They charged that if such intention should appear by the will, that nevertheless Sarah Penny was not intended to take beneficially, but in trust to carry out the wishes and intentions of the testatrix, and that such had been the understanding between the testatrix and Sarah Penny; that it was the intention of the testatrix to have expressed her wishes and intentions, but that no valid declaration of the same was ever made. The bill charged further that Sarah Penny alleged that such declaration was made by four paper writings, in the handwriting of the testatrix, containing her wishes (these papers were without date, and contained charitable gifts and bequests); but the plaintiffs insisted that these papers were insufficient to create a trust, and left the residue undisposed of, and that in consequence the plaintiffs were entitled.

The defendant, by her answer, insisted on her right to the residue beneficially; and as to the four paper writings she submitted that they could not be regarded for the purpose of the suit, and that the plaintiffs were not entitled to make use of them; that if, however, the court should think that the said paper writings did manifest any intention of the testatrix, then that, subject to the trusts declared by those paper writings, the defendant was entitled to the residue beneficially.

The cause was heard before the Vice-Chancellor, Knight Bruce, in July, 1849, who, on the 6th August, made the decree above men-

tioned,¹ from which the defendant now appealed to the Lord Chancellor.

The Solicitor-General, Mr. Malins, and Mr. Walford, for the plaintiffs, and in support of the decree of the Vice-Chancellor.

Mr. Bethell, Mr. J. Russell, and Mr. Hislop Clarke, for Sarah Penny, and in support of the appeal.

The Solicitor-General, in reply.²

THE LORD CHANCELLOR, after stating the facts of the case, and reading the clause of the will above set out, said : The question here is, whether the words annexed to the residuary bequest amount to a trust, or only denote the motive or reason of the gift.

The same point has very frequently occurred, and is the subject of very numerous decisions ; and, considering the infinitely various forms of expression, and the minute differences in them to which the principles had to be applied, it is not surprising that it should be difficult to reconcile them all one with the other ; but I think the principles themselves are now sufficiently certain, and that the duty which remains consists in the application of them to the peculiarities of each case as it arises. I therefore think that it would be an unnecessary occupation of time to go through the long series of cases in which they have been recognized. In the case of *The Corporation of Gloucester v. Osborn*, in which I was counsel, and which was argued, a few months before I left the bar, in the House of Lords, those numerous decisions came under review ; and they will be found collected in that case as reported in the first volume of the House of Lords Cases, page 272. I shall, therefore, content myself with stating the principles which I deduce from the present state of authority, and how I apply them to the words of the will in question, so as to lead me to the conclusion at which I have arrived, referring to the judgment given in this case in the court below, in which I generally concur.

I conceive the rule of construction to be, that words accompanying a gift or bequest expressive of confidence or belief or desire or hope, that a particular application will be made of such bequest will be deemed to import a trust upon these conditions, first, that they are so used as to exclude all option or discretion in the party who is to act, as to his acting according to them or not ; secondly, the subject must be certain ; and, thirdly, the objects expressed must not be too vague or indefinite to be enforced.

With respect to the first of these conditions, I am of opinion that there is no doubt that the words " well knowing," used in the present case, are equivalent to, if not synonymous with, the expression " in the fullest confidence," and that they are used in such a manner as to

¹ Reported 3 De G. & S. 525.

² The arguments of counsel are omitted. — Ed.

exclude all option or discretion. With regard to the second condition, no question exists.

With reference to the third condition, it has been contended that the object is not certain; and it has been stated, and with truth, that vagueness in the object is regarded as evidence that no trust was intended to be created; and it has been in effect argued, and indeed with very great plausibility, that the words which are superadded to the bequest are merely expressive of the testatrix's full conviction, from her reliance on the character of Miss Penny, that she would make as good use of what was given her as of her own property, and would in fact dispose of it in such a way as would further those objects which, as the intimate friend of the testatrix, she well knew that the testatrix was desirous of promoting. Specious, however, as this construction undoubtedly is, I am of opinion that it is not the true construction of these words. It is assuming the whole question to say that "views and wishes" are too vague to import a trust. The fact that the testatrix "well knew" or believed that Miss Penny would dispose of the property in a manner in accordance with the testatrix's views and wishes of necessity implies that the testatrix assumed that such views and wishes were already or would thereafter, either in writing or verbally, be made known. There is, therefore, nothing on the face of the words which necessarily implies what is vague and indefinite, as in those cases where the court has held that the uncertainty of the object has afforded evidence that no trust was intended.

But suppose that it cannot be found that the testatrix did in fact ever make known her views and wishes, or has made them known in a manner of which the court cannot take judicial notice. Even then it is impossible to say that she never did express them in writing: she may have done so, and the writing may have been lost or destroyed, or be incapable of receiving judicial notice. But it is not necessary to argue this: it is sufficient that the will distinctly indicates that Miss Harley intended to make them known, or had previously made them known, as otherwise the legatee could not do that which she, the testatrix, "well knew" the legatee would do; viz., act in accordance with them. There is no real and substantial distinction between such a case and the case of a testator who gives all his property to A. on trust, but never declares that trust. In the latter case, there is the fact that a trust *nominatim* exists or was intended, but the objects are unknown. Here is the fact that views and wishes exist; and the bequest is made in confidence that they will be accomplished, but the objects are unknown. It is true that possibly the objects included in such views and wishes might, if known, be too vague and indefinite to be enforced; but so might the objects of the trust *nominatim*, if they were known.

It is important to observe that vagueness in the object will unquestion-

ably furnish reason for holding that no trust was intended, yet this may be countervailed by other considerations which show that a trust was intended, while at the same time such trust is not sufficiently certain and definite to be valid and effectual; and it is not necessary to exclude the legatee from a beneficial interest that there should be a valid or effectual trust: it is only necessary that it should clearly appear that a trust was intended. Now, this is precisely the case with the present bequest. I agree with the Vice-Chancellor in interpreting "views and wishes" to mean "designs and desires;" and the very expression of confidence that Miss Penny would make a good use and dispose of the property in a manner in accordance with the testatrix's designs and desires or intentions, appears to me to amount to a declaration that Miss Penny was to hold the property for that purpose, or in other words to the same import, upon trust. It seems to me to be tantamount to a bequest upon trust; and if so, that is sufficient to exclude Miss Penny from taking the beneficial interest. Such views and wishes may be left unexplained, such trust be left undeclared: but still, in such case, it is clear a trust was intended; and that is sufficient to exclude the legatee from a beneficial interest. Once establish that a trust was intended, and the legatee cannot take beneficially. If a testator gives upon trust, though he never adds a syllable to denote the objects of that trust, or though he declares the trust in such a way as not to exhaust the property, or though he declares it imperfectly, or though the trusts are illegal, still, in all these cases, as is well known, the legatee is excluded, and the next of kin take. But there is peculiar effect in the word "trust;" other expressions may be equally indicative of a fiduciary intent, though not equally apt or clear.

In this case, however, we are not left to spell out a trust from the residuary clause alone. The fact that, besides a legacy of £3,000, another legacy is expressly given to Miss Penny, "in addition for the trouble she will have in acting as executrix," clearly shows that she was not intended to take the residue beneficially; because, if Miss Penny was to take the whole residue beneficially, as the testatrix must be presumed to have acted upon the belief which the fact warranted, that her estate was abundantly sufficient to satisfy all the bequests, there could be no object in taking out of that residue, of which she was to have the whole, £3,000 for her trouble. The fact of the legacy not only strongly confirms, but is only consistent with, the hypothesis that the whole residue was not to be taken beneficially. It cannot be referable to the trouble she would have in the execution of the bequests in the will itself or the proved codicils; for, though the bequests are numerous, not one of them involves any amount of trouble: whereas the views and wishes of the testatrix, to which she alluded, might be such that the carrying them into effect might involve the executrix in very difficult trusts.

Being clearly of opinion, upon these grounds, that a trust was intended, the question whether the unproved papers may be looked at in order to prove the intention to create a trust does not arise, or at all events it is unnecessary for me to consider it.¹

EATON v. WATTS.

IN CHANCERY, BEFORE SIR JOHN STUART, V. C., MARCH 20, 1867.

[*Reported in Law Reports, 4 Equity, 151.*]

JANE WATTS, having a testamentary power, by her will, dated the 25th of July, 1826, made the following disposition : —

“ I, Jane Watts, give and bequeath all property belonging to me at the date of this writing, over which I have any power, and all that may accrue to me after this time, to my dearly beloved husband, Admiral Watts, hoping that he will leave it after his death to my son, W. C. Watts, if he is worthy of it, with certain conditions hereunto annexed, viz.” Then followed directions as to certain pictures and jewels, and a gift of pecuniary legacies. The testatrix then, as to her watch, the gift of her dear father, left it to her dear son, to be given to him when he is old enough to take care of it; and in case of his death before that time, to Mrs. Henderson, for her daughter Georgiana, as the niece and god-daughter of her dear husband; all the trinkets that remained after what she had elsewhere named to be kept for her son’s

¹ In the following cases the words were held to import that the donee was not to take for his own benefit; but, inasmuch as the trust was too indefinite for the court to enforce, the beneficial interest resulted to the heir or next of kin : —

Stubbs v. Sargon, 3 M. & Cr. 507.

Bernard v. Minshull, Johns. 276 (Testamentary appointment to a husband, “but it is my request that, after using for his own absolute use and benefit £2,000, part of that sum, . . . he will make such disposition of the remainder by will or deed or settlement as he may deem most desirable to carry out my wishes, often expressed to him by word.” No wish had ever been expressed by the wife to the husband).

Buckle v. Bristow, 10 Jur. n. s. 1095 (Devise to trustees upon trust for such use, &c., as he should appoint, “And in default thereof, then for the same to be expended and appropriated within three years after his decease, in such way and manner and for such purposes as they, or the majority of them, might in their judgment and discretion agree upon”).

Yeap Cheah Neo v. Ong Cheng Neo, L. R. 6 P. C. 381.

Ingram v. Fraley, 29 Ga. 553 (Devise of everything to “my long-trying friend, W. F., . . . having the utmost confidence that he will entirely carry out my wishes and desires as they may be expressed by me, either verbally or in writing; and well knowing that my said friend will, by this will, be able much more effectually to dispose of my estate, as I wish it done, than I could at this time do myself, and with much less trouble to himself”). — *Ed.*

wife; if he should die without marrying, to be at the disposal of her husband. The testatrix added, "I fear I have not made myself very clear, but I am sure my husband will fulfil what I have named."

Along with the above testamentary disposition the testatrix executed a supplementary paper as follows:—

"My reason for leaving all I have to dispose of to my husband, and in his entire power, is, that my son is already certain of a handsome fortune independent of his father, and that I cannot now feel any certainty what sort of character he may become. I therefore leave it to my dear husband, in whose honor, justice, and parental affection I have the fullest confidence. I perceive I have made one great omission, viz. that if my son dies before my husband, though I leave all my property subject to the direction above named, without reservation, to my dear husband, to dispose of as he thinks fit, yet, should my son leave any children, I do not doubt it will go to them from him, knowing his steady principles, and clear judgment of right and wrong, and his sense of justice."

The testatrix died in July, 1826, leaving only one child, her son W. C. Watts, and her will, together with the supplementary paper, and certain codicils not material to be stated, were proved by Admiral Watts, who entered into the possession of her separate estate. He subsequently married a second wife, by whom he had several children. By his will, dated the 21st of September, 1854, after making provision for his wife, and reciting that, under the will of her brother, certain property devolved upon his, Admiral Watts's, first wife, he proceeded thus: "Whose universal legatee I am, when, should such bequest revert to me as heir to my said wife Jane, I leave the interest arising from it to my executors in trust, to be paid to my wife Elizabeth during the minority of any of her children, when it should revert to my eldest son, William Charles, together with such further assets as I may see fit to leave him by codicil or otherwise; but as it is expressly provided by his mother that this property shall revert to him upon condition that he is thought worthy of it, I leave a discretionary power to my wife to retain the use of it during her life, and even to make a destination of one-half of it to her own children, should his conduct be thought disreputable, which I trust it never will be. Should my son W. C. leave lawful issue, the entire amount shall revert to such issue. If he dies in the mean time, childless, or unmarried, the said bequest shall be divided in equal portions among the children of my present marriage, subject to such abatement as to her appears expedient. Should my son W. C. become my only surviving child, my other children leaving no lawful issue, I leave him all my property, except the sum of £1,000 to my sister."

Admiral Watts died on the 2d of January, 1860.

The son, W. C. Watts, having, as the bill alleged, always conducted himself in an honorable manner, died on the 3d of September, 1861.

His executors filed this bill, claiming the property bequeathed by Jane Watts to Admiral Watts, as impressed with a trust in favor of her son, W. C. Watts.

Mr. Greene, Q. C., and *Mr. Eaton*, for the plaintiff. It is well settled that the expression of a wish in connection with a gift, that a particular application be made of the property, will, unless a contrary intention appear on the will, create a trust. *Malim v. Keighley*; *Knight v. Boughton*.

The rule was laid down by Lord Truro, in *Briggs v. Penny*, that, where such language is used, it will be deemed to import a trust upon these conditions: first, that option is excluded; secondly, that the subject be certain; and, thirdly, that the object be not too indefinite. Applying that rule to this case, the gift clearly amounts to a trust. There is no option in the event that has happened. The option was to be exercised in the event of the son turning out badly; not otherwise. The subject is certain, her fortune; the object equally so, her only son.

On these authorities the plaintiff is entitled to the property.

Mr. J. Hinde Palmer, Q. C., and *Mr. Cecil Russell*, for the defendants. Whatever force may be attributed to the words of confidence and trust is removed by the contrary intention apparent in the will. In *Meredith v. Heneage*,¹ the language of the will was nearly the same as in the present case. The testator, after entreating his wife to settle part of his estate in a particular manner, devised to her all his estate "unfettered and unlimited, in full confidence and with the firmest persuasion" that she should devise the whole to one of testator's heirs; but it was held there was no trust. So in *Sale v. Moore*,² though the testator "recommended," and "did not doubt," that the object of the gift would consider his near relations, it was held there was no trust. In *Hoy v. Master*,³ where the testator gave part of his property at the sole and entire disposal of his wife, trusting her affection for their daughter would induce the widow to make her her principal heir, it was held there was no trust. The words in this will were "leave," but in *Lechmere v. Lavie*⁴ the marginal note was that "words of expectation in a will, not amounting to recommendation, will not create a trust." The true criterion is the intention of the testator; where it is to be collected from the will that the testator did not intend the words to be imperative there is no trust. *Knight v. Knight*.

In *Shepherd v. Nottidge*,⁵ where the testatrix bequeathed personal estate to her executors, in confidence that they would distribute them as she by memorandum would direct, but by the codicil she added,

¹ 1 Sim. 542; s. c. 10 Price, 306.

² 1 Sim. 534.

³ 6 Sim. 568.

⁴ 2 My. & K. 197.

⁵ 2 J. & H. 766.

“these wishes written by myself, and only concern the interest of my executors, will, I feel sure, be quite sufficient for them to fulfil all herein named,” it was held that on the will there would have been a trust, but that it was explained by the codicil, and that the executors took beneficially.

On these grounds, it is submitted that the property passes under Admiral Watts’s will.

Mr. Greene, in reply. The word “leave” or “devise” makes no difference, and occurred in *Wright v. Atkyns*,¹ where it was held that the words of the will created a trust. In *Webb v. Wools*² and in *Palmer v. Simmons*³ no question was raised as to the words “leave and dispose of,” which it was not denied might create a trust, though the court decided on the uncertainty of the subject-matter.

In *Harland v. Trigg* it was laid down that “gentle words would do,” if the object were distinct. In *Paul v. Compton*,⁴ Lord Eldon says, “Whether the terms are those of recommendation, or precatory, or expressing hope, or that the testator has no doubt, if the objects and subjects are certain, the words are considered imperative.” In *Parsons v. Baker*,⁵ the words were “not doubting,” but they were held sufficient. In one of the latest cases on this subject, *Shovelton v. Shovelton*,⁶ where a testator gave his residue to his wife, for her own absolute use and benefit, in the fullest confidence that she would dispose of the same for the benefit of her children, according to the best exercise of her judgment, and as family circumstances might require at her hands, the court held, notwithstanding the gift to her absolute use and benefit, that she took only an estate for life, with a precatory trust in remainder to her children.

On these grounds it is submitted that the plaintiffs are entitled.

SIR JOHN STUART, V. C. None of the cases cited can govern this case.

It is the well-settled doctrine of this court that a testamentary gift, accompanied by words of entreaty or recommendation, or expressing a wish or confidence, will be construed as creating an absolute trust which the object of the gift will not be permitted to defeat. But it cannot be said that all words of the same character are of equal force and cogency. The word “confidence” was the old name for trust, and may now, by virtue of the context, be of the same efficacy as the word “trust.” Even words of recommendation, or request, or of hope, which are hardly so strong, may be sufficient to create a trust. The distinction between these words is small, but there is generally something to be found in the context to indicate the intention of the gift.

¹ Coop. G. 111.

² 2 Sim. N. s. 267.

³ 2 Drew. 221.

⁴ 8 Ves. 375–380.

⁵ 18 Ves. 476.

⁶ 32 Beav. 143.

In some of the cases there is an uncertainty as to the property given ; in others, as in *Meredith v. Heneage*,¹ uncertainty as to the person, which was the view Lord Eldon took of that case. The court ought to look, not only at the particular passage, but at other expressions in the will explanatory of the degree of interest or power or control given to the person who is the object of the gift. None of the authorities appear to me to be inconsistent with Lord Alvanley's view in *Malim v. Keighley*, where he says the test is, "Can the object defeat the gift?"

So in *Meredith v. Heneage*, Lord Redesdale, as well as Lord Eldon, relied much on the words that the gift was "unfettered and unlimited." Where that is the clear meaning of the words, all notion of an absolute trust is excluded.

In the present case, the words of confidence are weaker than in most of the cases, while the expressions giving control to the object of the gift are extremely strong ; so strong, that, in my opinion, they bring this case within the observation of Lord Alvanley, that the subject of the gift was placed so completely in the power of the object of the gift, as that the testator left to him the option to defeat the wish or hope expressed. This, therefore, is a case in which the words expressive of hope are so qualified and overridden by the words which say that the testatrix leaves the property in her husband's "entire power," that it is impossible to hold that any valid trust is created, and there must be a declaration accordingly.²

¹ 10 Price, 306.

² In the following cases the language was held to be precatory, and therefore to create no trust or power in the nature of a trust:—

Cunliffe v. Cunliffe, Amb. 686 (Bequest to a son : "Nevertheless, in case his son Ellis should happen to depart this life without a son or sons born of his body in his lifetime, or in due time after his death, then and in such case he recommended it to him to give and devise the said sugar-houses and joint stock in trade there to his brother Robert").

Hoy v. Master, 6 Sim. 568 ("The other two-thirds shall be at the sole and entire disposal of my said wife Louisa Bird, trusting that, should she not marry again and have other children, her affection for our joint offspring, the said Marian Bird, will induce her to make our said daughter her principal heir").

Young v. Martin, 2 Y. & C. Ch. 582 (Testator gave his daughter a free power of appointment over certain property, adding that he recommended, though he did not absolutely enjoin, his daughter to distribute the same, at her decease, amongst her daughters in equal shares.)

Winch v. Brutton, 14 Sim. 379 ; *Huskisson v. Bridge*, 4 De G. & Sm. 245.

Webb v. Wools, 2 Sim. N. s. 267 (Gift of everything "unto my dear wife Jane, to and for her own use and benefit, upon the fullest trust and confidence reposed in her that she shall dispose of the same to and for the joint benefit of herself and my children").

House v. House, W. N. (1874), 189 (Residuary bequest "unto my said son John, requesting him that, if he should not find an opportunity to dispose of my free-

LAMBE v. EAMES.

IN CHANCERY, BEFORE SIR W. M. JAMES AND SIR G. MELLISH, L.JJ.,
MARCH 9, 10, 1871.

[*Reported in Law Reports, 6 Chancery Appeals, 597.*]

JOHN LAMBE, by his will, gave his freehold house in Cockspur Street, and all his estate, to his widow, "to be at her disposal in any way she may think best for the benefit of herself and family." The testator died in 1851, leaving the widow and children. One of his sons had an illegitimate son, Henry Lambe, born in the lifetime of the testator, but after the date of his will.

The widow died in 1865, having by her will devised the freehold house in Cockspur Street to trustees upon trust for one of her daughters, Elizabeth Eames, but charged with an annuity for Henry Lambe.

Henry Lambe filed the bill in this suit to obtain payment of the annuity, which was disputed by Elizabeth Eames on the ground that the widow had only a power of disposition amongst the family, and that Henry Lambe being illegitimate could not take under that power.

The Vice-Chancellor Malins decided that the devise to the widow was absolute, and that she had therefore power to devise to the plaintiff, as reported.¹

The defendant Elizabeth Eames appealed.

Mr. Bristowe, Q. C., and *Mr. W. Barber*, for the appellant. This case is covered by authority, which decides that such a gift constitutes a trust for the benefit of the children. *Woods v. Woods*; ² *Raikes v. Ward*; *Crockett v. Crockett*; ³ *Salisbury v. Denton*; ⁴ *Scott v. Key*; ⁵ *Godfrey v. Godfrey*; ⁶ *Lucas v. Goldsmid*.⁷ The widow was probably entitled to the income if she maintained the family, and was to have a large discretion as to the mode of investment and of dealing with the property; but that is all. If she had a power to appoint by will, it could only be amongst the family, and that will not include the plaintiff. *Reeves v. Baker*; ⁸ *Brook v. Brook*.⁹ It might be difficult to say, during her life, what was the exact nature of the trust, as it was in *Crockett v. Crockett*; but now that she is dead, it is clear that all

hold estate at Whitechurch greatly to his advantage, and to the benefit of his family, that the said estate should belong, after him, to his eldest son").

Wheeler v. Wheeler, 1 Giff. 300; *Lefroy v. Flood*, 4 Ir. Ch. 1.

McCormick v. Grogan, 1 Ir. R. Eq. 313; L. R. 4 H. L. 82, s. c. — Ed.

¹ Law Rep. 10 Eq. 267.

² 1 My. & Cr. 401.

³ 1 Hare, 451; 2 Ph. 553.

⁴ 3 K. & J. 529.

⁵ 35 Beav. 291.

⁶ 2 N. R. 16; 11 W. R. 554.

⁷ 29 Beav. 657.

⁸ 18 Beav. 372.

⁹ 3 Sm. & Giff. 280.

which remains must go amongst the testator's family. *In re Parkinson's Trust*.¹

Mr. Heath, for another defendant.

Mr. Cotton, Q. C., and *Mr. Warner*, for the plaintiff.

Mr. Bristowe, in reply.

SIR W. M. JAMES, L. J. In this case my opinion is that the decision of the Vice-Chancellor is perfectly right. If this will had to be construed irrespective of any authority, the construction would, in my opinion, not be open to any reasonable doubt.

It is the will of a man who was in business as a shopkeeper, and was, when he made his will, in the prime of life, with a wife and young children, and it is to this effect. [His Lordship then read the will.] Now the question is, whether those words create any trust affecting the property; and in hearing case after case cited, I could not help feeling that the officious kindness of the Court of Chancery in interposing trusts where in many cases the father of the family never meant to create trusts, must have been a very cruel kindness indeed. I am satisfied that the testator in this case would have been shocked to think that any person calling himself a next friend could file a bill in this court, and, under pretence of benefiting the children, have taken the administration of the estate from the wife. I am satisfied that no such trust was intended, and that it would be a violation of the clearest and plainest wishes of the testator if we decided otherwise.

The testator intended his wife to remain head of the family, and to do what was best for the family. If he had said, "I give the residue of my property to my three sons, each to take his share, to be at his disposition as he should think best, for the benefit of him and his family," — in such a case it would be clear that the testator did not mean to tie the property up, but to give a share to each son, believing that he would do the best for his family.

But it is said that we are bound by authority. The cases cited may, however, be distinguished. In this will there is, in the first place, an absolute gift, and we have to be satisfied that this gift is afterwards cut down. It was also argued that in some cases, as in *Crockett v. Crockett*,¹ the court has decided there was some interest in the children, but did not declare what it was, leaving the matter to be dealt with after the death of the tenant for life.

It is possible that in this case there may be some obligation on the widow to do something for the benefit of the children; but, assuming that there is such an obligation, it cannot be extended to mean a trust for the widow for her life, and after her death for the children, in such shares as she may think fit to direct. That would be to enlarge the will in a way for which there is no foundation; but unless the will has

¹ 1 Sim. N. S. 242.

² 2 Ph. 553.

that meaning, what trust is there? I cannot agree that she is to take what she likes, and that what she has not spent is to go at her death for the benefit of her children. In *Crockett v. Crockett*,¹ it was only decided that the children had some interest, and if the widow fairly satisfied that obligation, and gave them some interest, nothing more could be required.

Then this case was said to be like *Godfrey v. Godfrey*.² But there the Vice-Chancellor decided that there was an interest, though he did not define what that interest was. [His Lordship then read and commented on the judgment in *Godfrey v. Godfrey*, and said that the *ratio decidendi* in that case was that there was a trust.] But it is impossible in this case to say that there was a trust. The testator clearly intended her to deal with the property as she pleased, and contemplated that she might risk it in his trade.

The other cases cited are merely illustrations of the same kind, and do not enable the court to escape from the difficulty of having to decide upon the meaning of the word "family." It seems to me impossible to put any restriction upon the meaning of that word, or to exclude any person who, in ordinary parlance, would be considered within the meaning. The word might include sons-in-law, or daughters-in-law, and many others. It is equally uncertain what the property is, because if she could spend any part for her own private purposes, then there might be nothing left for the trust.

It is impossible to execute such a trust in this court, and if the case stood alone I should say that no sufficient trust was declared by the will. But if there be any such obligation, I think it has been fairly discharged by the way in which she has made her will, — giving part for the benefit of one member of the family, and part to a natural son, whom she might reasonably think it her duty to benefit.

It appears to me that the decision of the Vice-Chancellor is right, and that the appeal must be dismissed.

SIR G. MELLISH, L. J. I am of the same opinion. In order to reverse this decision, we must think that the testatrix has exceeded the authority which was given to her.

Now I conceive that the proper course is to find out what this will means, and not to give the construction which we desire, but to ascertain what the testator desired. We may take into consideration his position when he made this will. He was in business as a shopkeeper, and had a wife and young children. [His Lordship then read and commented on the terms of the will, and said that if the matter was unfettered by decision he should be inclined to hold it an absolute gift to the wife, with merely an expression of the testator's motives in doing so.] But suppose that these words do give the family some interest,

¹ 2 Ph. 553.

² 2 N. R. 16 ; 11 W. R. 554.

what is that interest? It is impossible to hold in this case, as Lord Cottenham seems to have thought in *Crockett v. Crockett*,¹ that the wife was tenant for life and the children entitled in remainder. It is quite inconsistent with a life-estate that she should be able to dispose of the *corpus*. At all events, she was to determine the interest which each child was to take, and also her own; and I do not understand how a court of equity can execute a trust where the testator says that he has such confidence in his widow that he wishes her, and not the Court of Chancery, to say what share she shall have and what share the children shall have.

I do not see why the wishes of the testator are not to be followed. The court might say that if she was giving the whole away she was not honestly executing the wishes of the testator; but even then I should have thought the words in this will too vague. I cannot, however, say that this lady has gone beyond what she was entitled to do, or has left more than she had a right to leave. Looking at the very general terms of the will, it is difficult to say that she was not right in providing for this illegitimate child. [His Lordship then read and commented on the judgments in *Woods v. Woods*,² and *Crockett v. Crockett*, and said that if, as in *Crockett v. Crockett*,³ it was so very difficult to decide what interests the widow and children took, that showed that the testator did not intend any decision to be made.] Here the words cannot be confined to management, for the wife had power to sell the *corpus* and spend it: she might spend it for the benefit of the children, but still she could spend it.

There is nothing here to show that the widow has exceeded her power, and the appeal must be dismissed with costs.⁴

¹ 2 Ph. 553.

² 1 My. & Cr. 401.

³ 2 Ph. 553.

⁴ In the following cases the words were held to be precatory, and therefore to create no trust, or power in the nature of a trust:—

Pope v. Pope, 10 Sim. 1 (Residuary bequest to a wife: “And my reason for so doing is the constant abuse of trustees which I daily witness among men; at the same time trusting she will, from the love she bears to me and her dear children, so husband and take care of what property there may be for their good; and should she marry again, then I wish she may convey to trustees . . . what property she may then possess for the benefit of the children as they may severally need or deserve, taking justice and affection for her guide”).

Brook v. Brook, 3 Sm. & G. 280 (Devise to testator’s niece, M. A. B., “to be her sole and separate property, . . . and with power . . . to appoint the same to her children and her husband in such way and in such proportions as she may think fit”).

Alexander v. Alexander, 2 Jur. N. S. 898 (“And my sons-in-law, F. H. and W. S. A., may dispose of the property I leave for the good of their families”).

Howorth v. Dewell, 29 Beav. 18 (Residuary bequest to a wife, “with power for her to dispose of the same unto and amongst all my children, or to any one or more of them, for such estate or estates, either in fee-simple or in tail, term of life or other interest,

STEAD v. MELLOR.

IN THE HIGH COURT OF JUSTICE, BEFORE SIR GEORGE JESSEL, M. R.,
MARCH 12, 1877.

[*Reported in 5 Chancery Division, 225.*]

MOTION for judgment.

Ursula Crook, by her will, dated the 13th of May, 1872, appointed the plaintiffs her executors, and, after making divers specific and pecuniary bequests, gave all her personal estate, except what she otherwise bequeathed by that her will, to the plaintiffs, upon trust to convert the same into money, and, after payment of her funeral and testamentary expenses and debts, and the legacies other than specific given by her will, to hold the residue of the said moneys "in trust for such of my nieces, Martha Paulton and Ursula Mellor Taylor, as shall be living at my death, my desire being that they shall distribute such residue as they think will be most agreeable to my wishes."

The testatrix died on the 16th of January, 1876, leaving Mrs. Paulton and Mrs. Taylor her surviving.

The action was brought by the plaintiffs, as executors of the will, to have the rights and interests of all persons in the residuary personal estate of the testatrix ascertained and declared; and the only question calling for a report was, whether Mrs. Paulton and Mrs. Taylor were entitled to the residue beneficially or as trustees; and, if as trustees, then who were the persons beneficially entitled thereto.

C. Stewart, for the plaintiffs.

Cookson, Q. C., and *Caldecott*, for some of the next of kin. This case is governed by the decision in *Briggs v. Penny*, where the words were, "well knowing that she will make a good use and dispose of it in a manner in accordance with my views and wishes." The distribution is not to be to whom the donees may please, as in the case of *In re Bond*,¹ but in accordance with the wishes of the testatrix. The uncertainty as to what those wishes may have been does not prevent a trust being constituted. The word "distribute" shows that the testa-

temporary or lasting, . . . as my said wife shall, in her discretion, see most fitting and proper").

Scott v. Key, 35 Beav. 291 ("The balance . . . to go to my dear wife, being well assured that she will husband the means that may be left to her by me with every prudence and care, for the sake of herself and any children that I may leave by her").

— ED.

¹ 4 Ch. D. 238.

trix did not intend Mrs. Paulton and Mrs. Taylor to hold the property themselves.

Davey, Q. C., and *W. F. Lawrence*, for others of the next of kin. The circumstance of the gift being to Mrs. Paulton and Mrs. Taylor, as joint tenants, is an indication that they were not intended to take the property beneficially.

Russell Roberts, for the trustees of Mrs. Taylor's mortgage settlement.

Chitty, Q. C., and *Alfred Bailey*, for Mrs. Paulton and Mrs. Taylor, were not called on.

JESSEL, M. R. I have often said that it is the duty of the court, in construing wills of personal estate, to look at the whole will, in order to ascertain the intention of the testator, not forgetting to apply general rules of construction, where such are applicable, but always giving to the language of the instrument its literal meaning, so far as the context allows.

I have been referred to the case of *Briggs v. Penny* as an authority for deciding that a trust is created. In that case, Lord Truro laid down what he considered to be the general principle. That is, of course, binding on me, although the decision itself would not necessarily be so, even if the words in the case before me were identically the same. *Gibson v. Fisher*.¹

Now, all that Lord Truro said with respect to the principles which he deduced from the then state of authority was this: "I conceive the rules of construction to be, that words accompanying a gift or bequest expressive of confidence or belief, or desire or hope, that a particular application will be made of such bequest, will be deemed to import a trust upon these conditions: first, that they are so used as to exclude all option or discretion in the party who is to act, as to his acting according to them or not; secondly, the subject must be certain; and, thirdly, the objects expressed must not be too vague or indefinite to be enforced."

Lower down, he says that there is no real and substantial distinction between the case of a testator who intends to make known, or has previously made known, his views and wishes to the legatee, and the case of a testator who gives all his property to A. on trust, but never declares that trust. To this I respectfully agree. But beyond these general principles, I find nothing in *Briggs v. Penny* to guide me to a conclusion in the present case. It was a decision on the particular words of a will. It has never been followed, as far as I know; at any rate, I am not aware of any case in which words so vague and so indefinite have been held to create a trust. The words were, "well knowing that she," the legatee, "will make a good use and dispose of it in a

¹ Law Rep. 5 Eq. 51.

manner in accordance with my," the testatrix's, "views and wishes." Lord Truro appears to have been of opinion that the words "well knowing" were equivalent to, if not synonymous with, the expression "in the fullest confidence," and that they were used in such a manner as to exclude all option or discretion. With all deference to his Lordship, that is a most unsatisfactory reason. Why should the words "well knowing" bear any other than their natural meaning? No reason is given why they should. However, that is the decision.

Whether the case of *Briggs v. Penny* was rightly or wrongly decided (and I must not forget that it affirmed the decision of a very learned judge, the Vice-Chancellor Knight Bruce), it is distinguishable from the present case, and as the words are not the same, and I am not bound to regard it as a binding authority on the construction of the particular will now before me, I am free to inquire what the testatrix did really mean; and unless I find in the will something equivalent to a declaration that the residuary legatees take as trustees, I must hold that they take a beneficial interest. The testatrix gives all her personal estate, except what she otherwise bequeathed by her will or any codicil thereto, to trustees upon trust to convert the same into money. It is clear that she knew how to create a trust. And then, after payment of her personal and testamentary expenses and debts and legacies, she directs her trustees to hold the residue of her money upon trust for her two nieces, her desire being that they shall distribute such residue, not "in accordance with my views and wishes," as in the case before Lord Truro, or "as they know will be most agreeable to my wishes," but "as they think will be most agreeable to my wishes." What is that but to make them judges of the mode of distribution, and place the residue at their absolute disposal?

But for the case of *Briggs v. Penny* this case would not have been arguable. There must be a declaration that Mrs. Paulton and Mrs. Taylor take the residue for their own benefit.¹

¹ *Wells v. Doane*, 3 Gray, 201 ("It is my will and intention that the said S. W. may dispose of the furniture, plate, pictures, and all other articles now in my house, absolutely, as he may deem expedient, in accordance with my wishes as otherwise communicated by me to him").

Wells v. Hawes, 122 Mass. 97 (Residuary devise to J. S., "having full confidence that he will so use and dispose of it as to carry out my wishes in regard to the distribution of my personal estate, as expressed in a memorandum which I shall leave in his possession"), *accord.* — ED.

In re HUTCHINSON AND TENNANT.

IN THE HIGH COURT OF JUSTICE, BEFORE SIR GEORGE JESSELL, M. R.,
MAY 11, 1878.

[*Reported in 8 Chancery Division, 540.*]

FRANCIS ROE made his will, dated the 6th of September, 1855, in the following terms. . After directing his debts to be paid by his executrix thereafter named, the testator proceeded: "As to, for, and concerning all my real and personal estates, of whatever nature, kind, or quality, and wheresoever the same may be situate, I give, devise, and bequeath the same to my dear wife Hannah Roe, absolutely, with full power for her to dispose of the same as she may think fit for the benefit of my family, having full confidence that she will do so." And the testator appointed his wife his executrix.

The testator died in 1864. His widow Hannah Roe, by her will, dated the 28th of March, 1877, devised and bequeathed all her real and personal estate to her executors and trustees in trust for sale, and shortly afterwards died.

Francis Roe had nine children, eight of whom were now living.

Hannah Roe's trustees having contracted to sell a public-house called the King's Arms at Bakewell, originally forming part of the real estate comprised in Francis Roe's will, the purchaser raised the objection that Hannah Roe did not take an absolute interest under the latter will, but that the will created an ultimate trust in favor of the testator's children, his widow taking only a life-estate, and consequently that the concurrence of the children was necessary.

The point was submitted for the opinion of the court upon a summons taken out by the vendors under the Vendor and Purchaser Act, 1874, to obtain a declaration that they could make a good title under the wills.

B. B. Rogers, for the vendors. I submit that there is no trust for the testator's children, but that his widow took absolutely. *Lambe v. Eames*; *Stead v. Mellor*, where your Lordship distinguished *Briggs v. Penny*. This is in terms an absolute gift, with a superadded power of disposition, which is however nugatory, and does not detract from the prior absolute gift. *Southouse v. Bate*; ¹ *Weale v. Ollive*.²

Dunning, for the purchaser. This is in effect a gift to the widow for life, with a precatory trust in remainder in favor of the testator's children: *Shovelton v. Shovelton*; ³ *Curnick v. Tucker*; ⁴ *Le Marchant v.*

¹ 16 Beav. 132.

² 32 Beav. 421.

³ 32 Beav. 143.

⁴ Law Rep. 17 Eq. 320.

Le Marchant;¹ taking "family" to mean "children:" *Pigg v. Clarke*.²

[JESSEL, M. R. A testamentary gift by a married man to his "family" should be read as a gift to his "children."]

By adopting the vendors' contention you would entirely cut out the clause after the word "absolutely," — a clause which is significant, and to which effect can and should be given.

In *Lambe v. Eames* the words were different, and I ask your Lordship to follow the more recent decisions in *Curnick v. Tucker* and *Le Marchant v. Le Marchant*.

[JESSEL, M. R., mentioned *Mackett v. Mackett*.³]

JESSEL, M. R. I have to consider a very short will, and to give my opinion upon it. Now, if it had not been for authority, looking at the will, I should have felt no doubt or hesitation in saying what its meaning was. [His Lordship then read the will as above stated, and continued:] It is alleged on one side and denied on the other, that these words, "with full power for her to dispose of the same as she may think fit for the benefit of my family, having full confidence that she will do so," constitute a trust. In my opinion, these words, standing by themselves, independently of authority, are not intended to impose any obligation on the widow. They are merely an expression of the testator's wishes and belief, as distinguished from a direction amounting to an obligation. His widow is to have power to give the property to any one she may think fit: she is to be complete owner of the property; but he expects her to dispose of it among his family, that is, his children. There is no occasion to tell her that she is to provide for herself, there being already a prior absolute gift to her. If you make the power override the absolute gift, the wife gets nothing, for you could then only give her an interest by inserting in the power something which is not there, namely, the word "wife." If you do not put in that word, you make her a trustee for the testator's family, that is, his children only; for there is no reported case in which the word "family," when used by a married man, has been held to include his wife as well as his children.

Now, that being the position of matters, the question I have really to consider is whether, having come to that conclusion as to the meaning of the instrument, I am compelled by decisions of other judges to arrive at the opposite conclusion. It appears to me that all the cases are distinguishable. Here is a gift by a testator to his wife absolutely, with something which looks like a superadded power, and there are some authorities in which it has been held that under such a gift the wife takes a life-interest only. There is, however, an authority of the Court of Appeal of a strong character against that view. In *Lambe v.*

¹ Law Rep. 18 Eq. 414.

² 3 Ch. D. 672.

³ Law Rep. 14 Eq. 49.

Eames the testator gave his estate to his widow, "to be at her disposal in any way she may think best for the benefit of herself and family;" and the Court of Appeal held, affirming the decision of Vice-Chancellor Malins, that the widow took absolutely. I observe that the Vice-Chancellor seems to have laid some stress on the words "for the benefit of herself and family," as showing the intention to give the widow an absolute interest. But I do not think it was necessary to do that. If you struck out the word "herself," it would still be clear that the widow was to have some benefit. When the testator says, "for the benefit of herself and family," he merely expresses that which would have been implied, though not expressed, because he has already given a benefit to his widow.

I am, therefore, of opinion that the present case is not distinguishable from *Lambe v. Eames*, which is an authority entirely in point.

I have been referred to two authorities¹ decided since *Lambe v. Eames*, and apparently in conflict with it; but they are decisions of inferior courts, and no number of decisions by inferior courts can overrule a decision of a superior court. In my opinion, the decision of the Court of Appeal in *Lambe v. Eames* covers this case, and I shall therefore follow it.

Both on principle and in consonance with the most modern authorities, I decide that the widow took absolutely, and therefore that the title is good.

¹ *Curnick v. Tucker*, L. R. 17 Eq. 320, before Sir Charles Hall, V. C. (Gift of everything to testator's wife, "for her sole use and benefit, in the full confidence that she will so dispose of it amongst all our children, both during her lifetime and at her decease, doing equal justice to each and all of them"); and *Le Marchant v. Le Marchant*, L. R. 18 Eq. 414, before Sir R. Malins, V. C. (Gift of everything to testator's wife, "for her sole use and benefit, in the full confidence that she will so bestow it on her decease to my children in a just, true, and equitable spirit, and in such manner and way as she feels would meet with my full approval"). In *Curnick v. Tucker*, *supra*, much reliance was placed upon the authority of *Wace v. Mallard*, 21 L. J. Ch. 355; 16 Jur. 492, s. c.; in which case Sir James Parker, V. C., held that a gift of everything to the testator's wife, "to and for her sole use and benefit, in full confidence that she, my said wife, will in every respect appropriate and apply the same unto and for the benefit of all my children," created a life-estate in the widow, with a mandatory power of appointment in favor of the children. But see observations upon this case in 1 Jarm. Wills (5th Am. ed.) 688.

In *Barnes v. Grant*, 26 L. J. Ch. 92, Sir R. T. Kindersley decided that a bequest of all the testator's property to his wife, "under the firm conviction that she will dispose of and manage the same for the benefit of our children," created an exclusive trust for the children. See also *Blakeney v. Blakeney*, 6 Sim. 52. — ED.

PARNALL v. PARNALL.

IN THE HIGH COURT OF JUSTICE, BEFORE SIR RICHARD MALINS, V. C.,
JULY 23, 1878.

[Reported in 9 Chancery Division, 96.]

EDWIN PARNALL, of Exeter, in his will, dated the 23d of November, 1871, made the following devise and bequest:—

“I give and bequeath to my wife Ann Parnall, after the payment of my just debts, the whole of my real and personal property for her sole use and benefit. It is my wish that whatever property my wife might possess at her death be equally divided between my children.”

The widow claimed to be absolutely entitled to the property, and the question came on to be decided on demurrer whether the property was affected with a trust for the benefit of the children.

J. Pearson, Q. C., and *Byrne*, for the widow, cited Attorney-General v. Hall;¹ *Lechmere v. Lavie*;² *Bland v. Bland*;³ *Wynne v. Hawkins*; *Perry v. Merritt*;⁴ *Cowman v. Harrison*;⁵ as showing that where there is no certainty of the subject of the gift there can be no gift over.

Glasse, Q. C., and *Campbell*, for the children, cited *Horwood v. West*;⁶ *Le Marchant v. Le Marchant*;⁷ *Foley v. Parry*.⁸ This is a case where, if the wife elects to take the property, she does so on condition of leaving what remains to her at her death to the children, as in *Willis v. Kymer*.⁹

MALINS, V. C. In this case there is no precatory trust, for there is not a definite gift over as there was in *Le Marchant v. Le Marchant*, and there is no obligation here for the widow to possess anything at her death. In order to create a trust which can be carried into execution there must be a definite subject-matter. Here the widow has a right to spend the whole of the property, and so there can be no trust affecting it. This is the principle on which all the cases cited from Attorney-General v. Hall to *Cowman v. Harrison* proceed. The case of *Horwood v. West*, cited by the other side, is really in accordance with the other cases; for there the testator's widow was, in the opinion of the court, bound to give all that the testator left her to the children after her decease. In *Breton v. Mockett*,¹⁰ lately decided by me, I held that where consumable articles were given to a widow for life, but without any obligation to keep them in repair, and so that she should

¹ Fitzgib. 314.

² 2 My. & K. 197.

³ 2 Cox, 349.

⁴ Law Rep. 18 Eq. 152.

⁵ 10 Hare, 284.

⁶ 1 S. & S. 387.

⁷ Law Rep. 18 Eq. 414.

⁸ 5 Sim. 138; 2 My. & K. 138.

⁹ 7 Ch. D. 181.

¹⁰ 9 Ch. D. 95.

not account for depreciation, there could be no gift over, but she took the absolute interest. So here I decide that the children take no interest, and the demurrer must be allowed.¹

¹ Anon., 2 Eq. Abr. 291, pl. 8 ; Palmer v. Schribb, 2 Eq. Abr. 291, pl. 9 ; Eade v. Eade, 5 Mad. 118 ; Lechmere v. Lavie, 2 My. & K. 197 ; Hood v. Oglander, 34 L. J. Ch. 528, *accord*.

Conf. Constable v. Bull, 3 De G. & Sm. 411 ; Bibbens v. Potter, 10 Ch. D. 733 ; *In re Thomson's Estate*, 13 Ch. D. 144 ; Espinasse v. Luffingham, 3 Jo. & Lat. 186 ; 9 Ir. Eq. 129, s. c. — ED.

GRAVES v. GRAVES.

IN CHANCERY, IRELAND, BEFORE BRADY, C., MAY 8, 1862.

[Reported in 13 *Irish Chancery Reports*, 182.]

WILLIAM GRAVES, by his will, devised certain real and personal property to trustees upon trust, amongst other things, to pay to his wife an annuity of £100 a year for life, in addition to her jointure, and also to pay to his sister an annuity of £50 a year for life. The will then contained the following passage: "And I do hereby declare it to be my earnest wish that my said sister shall reside at Gravesend with my dear wife during her life." The testator devised his house at Gravesend, with the household furniture, &c., to his wife for life. Mr. Graves died in 1853. Misunderstandings having arisen between Mrs. and Miss Graves, they, in 1853, ceased to live together; and the petition in this cause was filed by Miss Graves, praying a declaration of her right to reside at Gravesend during her life, and to be boarded by Mrs. Graves.

Mr. Warren and Mr. Dames, for the petitioner.

Mr. Brewster and Mr. A. Henderson, contra.¹

THE LORD CHANCELLOR. There can be no doubt that an expression of the testator's wish may attach on the property devised by him, and may be enforced by this court; but we are always bound to consider the subject-matter to be effected, and to see what the testator really intended to be done.

Had this expression of wish been attached on any property, as upon a house, it would be one thing; as, if he had said, "I wish that my sister should reside in my house at Gravesend," it might be said that this gave her a right to have a portion of the house allotted to her. Those, however, are not the words of the present will, which says, "I declare it to be my earnest wish that my said sister shall reside at Gravesend with my dear wife during her life." What does that mean? It means, if anything, that they should reside together. He intends, with respect to both, for the sake of mutual society and comfort, that they should pass their lives together. I should hesitate long before saying that this was a trust which this court would enforce. The right of maintenance is given up; but if it were not, could this court be called on to say which was right and which was wrong, in their misunderstanding, or to say that they were to be compelled to spend their time together? The will, however, in my opinion, does not point to residence as property in the house, but to residence with Mrs. Graves as a

¹ The arguments of counsel are omitted. — Ed.

member of her family. I cannot give an equivalent. An equivalent would destroy a part of the bequest, the intention of which was to give to each from the other the benefit of society and intercourse. I cannot say that a residence, or payment for one, would be an equivalent; and if these ladies cannot agree to live together on friendly terms, I cannot compel them.¹

IN THE MATTER OF PENNOCK'S ESTATE.

IN THE SUPREME COURT, PENNSYLVANIA, JANUARY 27, 1853.

[*Reported in 20 Pennsylvania Reports, 268.*]

THE opinion² of the court was delivered January 27, 1853, by

LOWRIE, J. This case has already been twice before this court, and the action of the court on those occasions is reported in Coates' Appeal³ and in McKonkey's Appeal.⁴ In both those instances the will of Isaac Pennock has undergone the construction of this court, in so far as it relates to the rights here in controversy; and now, when the cause comes on for final determination, we are asked by the appellants to hear them again on their rights under that will, before the door of justice is forever shut against them.

We have, therefore, heard and reheard, before a full court, the argument which the parties have thought proper to present on the original question, partly because we could not say that the question was conclusively settled by an interlocutory order, and partly because it is impossible to deny that there is an irreconcilable discrepancy in the two opinions and orders heretofore announced in this very cause. We have given to the question a very careful consideration, and are now prepared to pronounce the judgment which is, in our opinion, demanded by the law.

For the purpose of introducing this question in its general aspect, we need to state no more than that Isaac Pennock devised to his wife Martha all his real estate for life, and all his personal estate "absolutely, having full confidence that she will leave the surplus to be divided at her decease justly among my children." The mother is now dead, and the children claim that the bequest of the personal estate was a trust for their benefit, and have filed their petition against their mother's executor for an account. The argument in support of the petition is that the words which I have quoted from the will are of a technical character, and do of themselves import a trust, and that such is here

¹ See *Dawkin v. Penryhn*, 4 App. Cas. 51. — Ed.

² See *supra*, page 79, note 1. — Ed.

³ 2 Pa. St. 129.

⁴ 13 Pa. St. 253.

the proper construction of them, unless there are other expressions controlling them and showing a contrary intent.

Certainly the principles of equity are part of our common law. It is the very essence of common or customary law, that it consists of those principles and forms which grow out of the customs and habits of the people. It is, therefore, involved in its very nature, that only so much of the English law as is adapted to our circumstances and customs is properly recognized as part of our common law. This same principle is most emphatically involved in the cardinal maxim of all common law, *cessante ratione legis, cessat et ipsa lex*.

The technical effect insisted upon as belonging to the words already quoted having never received a judicial sanction in this State until the first opening of this cause, and no rights having ever been finally decided according to it, the question is still fairly open for consideration, whether, under our law, these words have any such technical character. It is, of course, a consideration of some weight, that, besides our provincial existence with many laws and institutions peculiar to ourselves, we have existed as an independent State for three-quarters of a century, without learning that such words have any technical meaning by our law, or are to be construed differently from words of common parlance.

It is unquestionable that such modes of expression were formerly used in the Roman and in the English law, in order to create a trust, and it was founded on good reason; but if that reason had passed away before the settlement of this country, then the rule which depended upon it was not imported as part of the law which we brought from the mother country. That it remains of any force in England, after the reason of it has ceased, is not surprising; for it is a common fate of institutions to outlive the causes which gave rise to them, and thus very often the form survives the principle which it was designed to express.

It is acknowledged that the rule by which a trust is raised out of such words was imported into the English from the Roman law. Its origin, therefore, in the Roman law, is a relevant subject of inquiry; for if we find it arising there, not from the ordinary meaning of the words, but under the constraint of circumstances which have no existence here, the force of the Roman rule will be much impaired, if not destroyed. If, under their law, words of common parlance acquired a technical value by reason of a peculiar institution, then that technical value depends upon circumstances and ceases with them, and the common meaning alone remains. To construe such words after that, as technical, is, in almost all cases, to pervert the true meaning of the words, unless other parts of the instrument clearly show that they are technically used.

It was part of the Roman law that the heir or devisee accepting the

estate of a decedent became at once charged with the payment of all his debts, whether the estate was sufficient to discharge them or not. Hence, and by way of compensation, he was not bound to pay any of the legacies bequeathed by the testator ; but this matter was left by the law entirely to his discretion. It was of the essence of a Roman will that the devisee should be universal successor to the property and debts of the decedent. He was in form and substance what we would call executor and sole devisee and legatee, with the additional qualification that he (or they, for many might be joined) was bound personally for the debts, if he accepted the devise.

It is plain how restricted was the right of devise under such a law. When all the testator's bequests could be defeated at the pleasure of the devisee or instituted heir, he had no alternative but to use words of confidence, recommendation, or entreaty, as to any legacies or special devices, and such words would be much more likely to be regarded than the clearest imperative words.

Moreover, there were great and peculiar difficulties in making a valid will at all under the Roman law, owing to the excessive strictness and complexity of the formalities required ; and hence it was usual to add a codicil, in which the testator entreated his heir-at-law, if the will should not stand, to make the desired dispositions, or to hold the property for the benefit of the persons named in the codicil. Here, again, words of entreaty are much more appropriate than imperative words. Under the circumstances, they clearly proved an intention to impose a duty on the general devisee as far as was possible, and not merely to intrust him with a discretion. He intended a legacy ; it was the law that made it discretionary in disregard even of imperative words.

It is very plain that such an institution is at war with moral principle, and it could not exist long without giving rise to many aggravated cases of breach of such trusts, that would call loudly on the law to interfere with the discretion of the heir or devisee, and enforce the clear intention of the testator. Hence arose an alteration of the law, and the prætors were required to enforce trusts that were created in this form. Under such circumstances the new rule was a proper one ; for it enforced the very duty imposed by the testator in the best form in which he was allowed to express it. No doubt the law continued after the reason of it had ceased ; but then it contravened the intention of the testator by enforcing, as a binding obligation, what had been intrusted to the discretion of the heir or devisee. These matters are fully illustrated in Domat, 2, 3, 1 ; 1 Spence's Eq. Jur. 435 ; and in the Corpus Juris Civ. Inst. 2, 20, and 25 ; Dig. 28, 1, and 29, 7, and 30, 31, and 32 ; Code 6, 23 and 36.

Very similar was the origin of such trusts in England. The power of devise existed among the Anglo-Saxons in its fullest extent, and

hence we might expect to find no such trusts among them, and it is said that no Anglo-Saxon will has been found containing the appointment of an executor charged with trusts. 1 Spence's Eq. Jur. 23, quoting Hinks's Dissert. 37. But, after the Norman Conquest, and under the strict principles of feuds, devises of lands were not allowed. Hence the frequent resort to conveyances in trust, in order to be able to make provision for younger children, and for other purposes. These trusts were at first of no binding obligation, but depended for their execution entirely upon the honor of the grantee, and it was therefore very natural and appropriate that words of recommendation, desire, entreaty, and confidence should be used. Dishonesty would, of course, often occasion enormous grievances arising out of breaches of such confidence. It was very easy then for an English Chancellor to bring in the Roman law to correct such evils. It was really enforcing what was intended to be a trust, and changing the law to do it. It was equality stepping in to correct the deficiencies of common-law institutions, and modifying them into accordance with the changing customs and circumstances of the people. The rule, thus properly introduced, has of course outlived the circumstances which gave it birth, and which alone ought to maintain it.

But the rule is fading away, even in England. The disrelish with which it is received by the legal and judicial minds of that country may be seen in the doctrine of extreme certainty required as to the subject and object of the recommendation: *Wright v. Atkins*; ¹ *Ex parte Payne*; ² *Tibbetts v. Tibbetts*; ³ *Harland v. Trigg*; and in the fact that it is degraded into the class of implied or constructive, and not express trusts: *Lewin on Trusts*, 66; *Jeremy*, 99; 2 *Rop. on Leg.* 380, &c.; 2 *Story Eq.* § 1074; 1 *Atk.* 619; and that it is everywhere regarded as frustrating the will of the testator: 1 *Sim.* 540, 551; 1 *Ves. & B.* 315; 2 *Story Eq.* §§ 1069-1074.

Such words are not now regarded in England as creating a trust, unless, on the whole, they ought to be construed as imperative. 2 *Spence Eq. Jur.* 65; 1 *Bro. P. C.* 481; 2 *Ves. Jr.* 632. And the rule is treated as a mere artificial one, that is to be strictly limited to the demands of authority. It looks upon the words as *prima facie* words of trust. 7 *Sim.* 665; 2 *Ves. Jr.* 335, 533. Yet any words or expressions are eagerly seized hold of as indications of a contrary intent. 1 *Sim.* 550, 552; 15 *Sim.* 33, 300; 3 *Beav.* 172; 5 *Cl. & Finn.* 147, 153; 1 *Bro. C. C.* 143; 2 *My. & K.* 144.

Where it is apparent that the kindness or justice or discretion of the devisee is relied on, no trust arises. 9 *Sim.* 319; 10 *Sim.* 1; 5 *Madd.* 434; 3 *Beav.* 154, 172, 176; 2 *Y. & C. n. s.* 582, 590; 2 *Ves. Jr.* 530, 533. And if it can be implied from the words that a

¹ 1 *Ves. & B.* 313; *Turn. & Russ.* 157.

² 2 *Y. & C.* 646.

³ 2 *Y. & C.* 664.

discretion is left to withdraw any part of the subject of the devise from the object of the wish or request, or to apply it to the use of the devisee, no trust is created. 2 My. & K. 201; 10 Sim. 5; 3 Beav. 173-174; 1 Bro. C. C. 179; 2 Bro. C. C. 585; 3 Ves. Jr. 7; 5 Madd. 121; 1 Sim. & S. 389; 6 Beav. 342; 2 Cox, 354. See also 2 Spence Eq. Jur. 65 *et seq.*

Now it is very plain that, on the former hearing of this cause, Chief Justice Gibson regarded Mrs. Pennock as having the right to withdraw the principal as well as the interest for her own use as the absolute owner. He says, 13 Pa. St. 258: "It is plain that she was to use, not only the income of the personal estate, but the estate itself, as if she were the untrammelled owner of it. What other meaning can be given to the word 'absolutely'? We may not strike it out, and if he meant not to give her a right to consume both principal and proceeds, he knew not what he said." And the order of reference to ascertain "the value of the surplus of the testator's personal property unconsumed at Mrs. Pennock's death," was a consequence of that opinion. But it was not a legitimate consequence, as the cases last above referred to prove; for if she might apply the principal to her own use, then there can be no trust, and the case ought to have been dismissed, not referred. How could there be a trust, in the legal sense of that word? No trust or contract that is uncertain is enforced by law; because the law would have to define it, or, in other words, create it, before enforcing it.

If this is a trust, it was so in the mother's lifetime, and could have been enforced as such. But how compel her to hold for the benefit of her children that over which she had the absolute control, and which she could spend as she pleased? If she could thus use it, she was no trustee in the eye of the law, and her representative cannot be so treated after her death.

In fact, she did act all her lifetime as if she were the absolute owner, and did convert almost the whole of the property to her own use without any one of her children complaining of any breach of trust. And it is not now the surplus in fact that they are seeking to recover; but they are claiming from her executor an account of their property converted by their mother to her own use.

It cannot be denied that there is considerable discrepancy in the English decisions on this subject, and nothing less can reasonably be expected. An artificial rule like the one insisted on here, that is founded on no great principle of policy, and that sets aside, while it is professing to seek, the will of the testator, must continually be contested and must be frequently invaded. And no one can read the English decisions on this subject without suspecting that all important wills wherein similar words are found become the subjects of most expensive contests, and give rise to those family quarrels which are the worst

and most bitter and distressing of all sorts of litigation. We may well desire that such a rule shall never constitute a part of our law. It rejects the plain common-sense of expressions, and it is not in human nature to submit to it without a contest.

Let us examine this will without the aid of this antiquated rule. Isaac Pennock says: "I will and bequeath unto my dear wife Martha Pennock the use, benefit, and profits of all my real estate during her natural life, and also all my personal estate of every description, including ground-rents, bank stock, bonds, notes, book-debts, goods, and chattels, absolutely, having full confidence that she will leave the surplus to be divided at her decease justly among my children."

Now, it is plain that, if the words of confidence were left out, Mrs. Pennock would have taken the personal estate absolutely. What did he intend by those words of confidence? Evidently to commit all the personal property to the discretion of his wife. He expected her to use it as she pleased, and to leave what should remain at her death "justly" among his children; but he enjoined nothing. His will was to give her the power of disposal, because he had confidence in her. He intended no interference with or guidance of her discretion, but trusted all to a mother's heart. Yet this is the intention which the law is expected to guide. And, in order to enforce this demand, it is insisted that she had but a life-estate in the personal property. But the testator excludes this construction, for he places the real estate "for life" in contrast with the personal estate "absolutely;" and contrasted expressions cannot be equivalent. And yet, without forcing this construction, this case is at an end, unless it be insisted that the mother took no estate at all for herself, which is too absurd to be thought of. And as to the word "surplus," it can have no other meaning than the one above given, and that given by Chief Justice Gibson in the opinion before referred to. The view here taken of the words of confidence is further confirmed by other parts of the will, where he, with "perfect confidence" and "full confidence" intrusts his children to the kindness of their mother. Here, surely, he was intending no legal trust.

If the will of the testator was to give to his wife the property, to be disposed of at her discretion, it is not for the court to say that she has exercised that discretion badly; and it is impossible to say wherein, under a change of circumstances, he would have exercised it differently.

We may now add, that we know of no American case wherein the antiquated English rule has been adopted, and that, as it is now regarded even in England, this case would not now be governed by it. 1 Bro. C. C. 179; 2 Bro. C. C. 285; 5 Madd. 118; 6 Beav. 542; 2 Y. & C. 590; 2 Cox, 354; 3 Ves. Jr. 7; 15 Sim. 33; 1 Sim. 542; 5

Eng. L. & Eq. 49. See also 2 Pa. St. 131, and herein we agree with the learned judge of the court below.

It is not to be disputed that these views are directly opposite to those expressed by this court when this cause was first heard; but we cannot help it. We are bound to decide this cause upon our present views of the law. And such changes of opinion in the progress of a cause are not at all uncommon, owing to the increase of information or the change of judicial functionaries, or both. The case of *Lawless v. Shaw*¹ is an illustration of this, and it belongs to the class of cases we have been discussing. One Lord Chancellor declared it a case of trust, and a new chancellor granted a rehearing and declared the reverse, and his decree was affirmed in the House of Lords. Even in the present case the opinion first declared adopted the old English rule in all its stringency, while the second one obviously flinches from a full application of a construction so artificial and unnatural. Such vacillations are to be expected where an unusual rule comes to be first applied. It is well to declare at once, and before any wrong is consummated by our judgment, that the rule has no foundation in any of our customs or institutions, and no place in our law.

Our conclusions are, —

1. Words in a will expressive of desire, recommendation, and confidence are not words of technical, but of common parlance, and are not *prima facie* sufficient to convert a devise or bequest into a trust; and the old Roman and English rule on this subject is not part of the common law of Pennsylvania.

2. Such words may amount to a declaration of trust, when it appears from other parts of the will that the testator intended not to commit the estate to the devisee or legatee, or the ultimate disposal of it to his kindness, justice, or discretion.

3. By this will, the absolute ownership of the personal property of Mr. Pennock is given to his widow, with an expression of mere expectation that she will use and dispose of it discreetly as a mother, and that no trust is created thereby.²

¹ 5 Clark & Fin. 129.

² In the following cases, where the subject, object, and mode of distribution were clearly defined, the words were held to be mandatory, and therefore to create a trust:—

McRee v. Means, 34 Ala. 349 (Residuary bequest to a husband, to his use, behoof, and benefit in fee-simple, “but should my said husband die without issue of his body, it is my wish and will he shall give all of said property to R.”).

Rich v. Rogers, 14 Gray, 174 (Bequest to trustees for the benefit of testator's sisters and their children).

Negroes v. Plummer, 17 Md. 165 (Devise of everything to a sister: “It is my wish and desire, in case my said sister die without issue, that she shall will and devise all my negroes to be free, or manumit them in any other way she may think proper; this request I hope she will comply with in time, so as to carry my wish into effect”).

Van Duyne v. Van Duyne, 2 McCart. 503, reversing s. c. 1 McCart. 397 (Devise to two children, "hoping and believing they will do justice hereafter to my grandson, H. V. D., to the amount of one-half of the said homestead farm").

Cook v. Ellington, 6 Jones Eq. (N. Ca.) 371 (Bequest to a wife, "and my wish is, that, at her death, she will give the one-half of all I give her . . . to my brother J. P. C.").

Harrison v. Harrison, 2 Grat. 1. ("In the utmost confidence in my wife, I leave to her all my worldly goods, to sell or keep for distribution amongst our dear children, as she may think proper. My whole estate, real and personal, is left in fee-simple to her, only requesting her to make an equal distribution amongst our heirs").

In the following cases the words were held to be precatory, and therefore to create no trust :—

Ellis v. Ellis, 15 Ala. 296 (Bequest of everything to a wife, "recommending to her at the same time to make some allowance, at her convenience, to each of my brothers and sisters ; say to each \$1,000").

Hess v. Singler, 114 Mass. 56 (Residuary devise to a son : "I hereby signify to my said son my desire and hope that he will so provide, by will or otherwise, that, in case he shall die leaving no lawful issue living, the property which he will take under this will shall go in equal shares" to certain specified persons).

Sears v. Cunningham, 122 Mass. 538 (Devise of everything to a wife, "in her own name and for her own purposes, with only this condition, . . . and that I wish at the death of my wife C., that she should make an equal division of her estate to such children as survive her").

In the following cases, where there was a discretion given as to the mode of distribution, the words were held to be mandatory, and therefore to create a trust :—

Bull v. Bull, 8 Conn. 47 (Residuary bequest to A. and B., "with full confidence . . . that they will dispose of such residue among our brothers and sisters and their children as they shall judge shall be most in need of the same ; this to be done according to their best discretion").

Collins v. Carlisle, 7 B. Mon. 13 (Residuary bequest "to my beloved wife N. C., and to be disposed of by her and divided among my children at her discretion").

Dominick v. Sayre, 3 Sandf. 555 (Devise to a daughter for life, "with power to give the same, by deed or by will, to any of the male descendants of my family of the name of Dominick, and their heirs").

Aldrich v. Aldrich, 12 R. I. 141.

Steele v. Levisay, 11 Grat. 454. See *Reid v. Blackstone*, 14 Grat. 363.

In the following cases the words were held to be precatory, and therefore to create no trust :—

Gilbert v. Chapin, 19 Conn. 342 (Residuary bequest to a wife, "recommending to her to give the same to my children, at such time and in such manner as she shall think best").

Lines v. Darden, 5 Fla. 51 (Bequest to a daughter : "My will and desire is that such grandson so arriving at the age of twenty-one years . . . shall receive a portion of the estate as a loan, to have the management and receive the benefit of the same until the final distribution shall take place, and then to return the same to be equally divided with the rest of my estate").

Alston v. Lea, 6 Jones Eq. (N. Ca.) 27 (Bequest to a wife, "so that she can have the right to give it to our six children as she may think best").

Kinter v. Jenks, 43 Pa. 445 (Residuary bequest to a wife, "for her use and comfort and to be disposed of as she pleases at or before her decease, when, no doubt, she

will make such distribution of the same amongst our children as she may then think most proper"). See *Burt v. Herron*, 66 Pa. 400.

Lesesne v. Witte, 5 S. Ca. N. s. 450 ("I devise all my estate to my beloved wife, feeling entire confidence that she will use it judiciously for the benefit of herself and our children").

Thompson v. McKisick, 3 Humph. 631 (Bequest of property to a daughter, "to be hers forever, to be disposed of as she may think proper amongst her children and grandchildren, by will or otherwise").

See *Van Amee v. Jackson*, 35 Vt. 173. — Ed.

CHAPTER III.

FORMALITIES NECESSARY TO THE CREATION OF A TRUST.

SECTION I.

At Common Law.

CHIBBORNE'S CASE.

IN THE QUEEN'S BENCH, EASTER TERM, 1564.

[Reported in Dyer, 229 a.]

IN B. R. this term, in the case of Chibborne, it was moved for a doubt, whether the use or freehold of messuages in London pass at this day by bargain and sale made there by parol only without indenture or inrollment there made or not, by reason of the proviso contained in the Statute of Inrollments in the 27th of H. VIII. [c. 16¹], which in the first

¹ Be it enacted by the authority of this present Parliament, That from the last day of July, which shall be in the year of our Lord God 1536, no manors, lands, tenements, or other hereditaments shall pass, alter, or change from one to another, whereby any estate of inheritance or freehold shall be made or take effect in any person or persons, or any use thereof to be made, by reason only of any bargain and sale thereof, except the same bargain and sale be made by writing indented, sealed, and inrolled in one of the king's courts of record at Westminster, (2) or else within the same county or counties where the same manors, lands, or tenements, so bargained and sold, lie or be, before the *Custos Rotulorum* and two justices of the peace, and the clerk of the peace of the same county or counties, or two of them at the least, whereof the clerk of the peace to be one; (3) and the same inrollment to be had and made within six months next after the date of the same writings indented; (4) the same *Custos Rotulorum*, or justices of the peace and clerk, taking for the inrollment of every such writing indented before them, where the land comprised in the same writing exceeds not the yearly value of forty shillings, ii. s. that is to say, xij. d. to the justices, and xij. d. to the clerk; (5) and for the inrollment of every such writing indented before them, wherein the land comprised exceeds the sum of xl. s. in the yearly value, v. s. that is to say, ii. s. vi. d. to the said justices, and ii. s. vi. d. to the said clerk for the inrolling of the same: (6) and that the clerk of the peace for the time being, within every such county, shall sufficiently inroll and ingross in parchment the same deeds or writings indented as is aforesaid; (7) and the rolls thereof at the end of every year shall deliver unto the said *Custos Rotulorum* of the same county for the time being, there to remain in the

words seems to exempt all manner lands, tenements, and hereditaments in cities, boroughs, and towns corporate, but the words following, “s. wherein the mayors, aldermen, recorders, and other officer or officers have authority or have lawfully used to inroll any evidences, deeds, or other writings within their precinct or limits,” &c., seem to declare the intent and meaning of the makers of the statute, that the inrollment shall be reserved to the cities, boroughs, &c., in such manner and form as was usual before, therefore *quære* well thereof: for the citizens of London take and use the statute above, otherwise, s. that the bargain at this day and always since the statute hath been taken good there by parol only, &c. And according to this a verdict was given this term at Guildhall; and notwithstanding that the Chief Justice, Sir R. Catlyn, exhorted the jury to give a special verdict, and the counsel of the parties agreed thereto, yet they gave a flat verdict upon the disseisin in the point. But in Michaelmas Term next the opinion of the justices of both benches was, that the lands in cities, &c., are at common law exempt from the act.

PAGE v. MOULTON.

IN THE KING'S BENCH, MICHAELMAS TERM, 1570.

[Reported in *Dyer*, 296 a, *placitum* 22.]

THE father, upon communication of marriage of his youngest son, promised to the friends of the wife that after his death and the death of his own wife the son should have the land to him and his heirs. And the marriage is had; but this promise is by parol only, and no consideration on the part of the woman: and the father was seised of the land in his demesne, and not in use; and this found by special verdict upon not guilty. Whether the use changes by this covenant or not was the doubt. And by the opinion of all the four justices of the bench, without open argument, the use is not altered by such naked promise; and so adjudged in next Hilary Term.

custody of the said *Custos Rotolurum* for the time being, amongst other records of every of the same counties where any such inrollments shall be so made, to the intent that every party that hath to do therewith may resort and see the effect and tenor of every such writing so inrolled.

II. Provided always, That this act, nor anything therein contained, extend to any manner lands, tenements, or hereditaments, lying or being within any city, borough, or town corporate within this realm, wherein the mayors, recorders, chamberlains, bailiffs, or other officer or officers have authority, or have lawfully used to inroll any evidences, deeds, or other writings within their precinct or limits; anything in this act contained to the contrary notwithstanding. — Ed.

CALLARD v. CALLARD.

IN THE QUEEN'S BENCH, MICHAELMAS TERM, 1594.

[Reported in *Croke's Elizabeth*, 344.¹]

IN THE EXCHEQUER CHAMBER, MICHAELMAS TERM, 1596.

[Reported in *Moore*, 687, *placitum*, 950.²]

EJECTIONE firmæ. The case upon special verdict was, that Thomas Callard being seised in fee of certain land, in consideration of a marriage of Eustace, his eldest son, said these words (being upon the land): "Eustace, stand forth: I do here, reserving an estate for my own and my wife's life, give thee these my lands and Barton, to thee and thy heirs." The question was, if this was a good feoffment to Eustace.

Coke, Attorney-General, for the plaintiff. There are two points to be considered. First, if this shall inure as a feoffment to the use of Thomas Callard and his wife for their lives, and after to the use of Eustace and his heirs; or if it be an immediate feoffment, and the reservation void. Secondly, if it be not a feoffment, if the words spoken, being in consideration of marriage, the use shall arise out of the possession of Thomas, and shall execute by the Statute of Uses, although it be without deed. First, it seemeth that it is a good feoffment, and the use shall arise upon it, although the words reservant are first; for so the court is to consider it, to make all to stand together: and in 22 Elizabeth, between Hare and Barton, it was adjudged that where one giveth lands to J. S., reserving a rent to the feoffor and his heirs, *habendum* to the feoffee and his heirs, the reservation being before the *habendum*, yet the feoffment being by indenture, it is well enough, for the law shall marshal it according to the intent. So here it shall be intended as following, and to show the intent of the parties, and not to make it all void. Secondly, admitting that the reservation is repugnant, and it can be no feoffment, yet the use shall arise and execute by parol, for it is out of the Statute of Enrolments; for this doth not hinder the raising of any uses, but only upon bargains and sales, which shall not execute by bargain and sale, but by indenture enrolled; but all other uses are at the common law, which arise upon consideration upon marriage, &c. But he did agree that a use shall not arise upon general words, or words spoken *in futuro*, but *in presenti*; as to say, "If you do such a thing, I will give you my land." But upon words spoken advisedly, and by reason of a valuable and great considera-

¹ s. c. Popham, 47. — Ed.² s. c. *nom.* Tallarde v. Tallarde, 2 And. 64. — Ed.

tion, and spoken *in presenti*, as, "I do here," &c., which is an immediate gift. And he had seen the record of the case 12 Elizabeth, Dyer, 296, and the words were upon communication of a marriage to be had; "I will assure after my death Old-Acre to my son," it was ruled no use ariseth, and the reason seemeth to be that the words were spoken *in futuro*; and therefore if one saith to his son, in consideration he is his son, "I do give thee my manor of D.," this is sufficient to raise a use; for they being words spoken with advisement, and for consideration, it shall be intended a gift of the land.

GAWDY. I have not seen any book that at the common law a use shall arise by parol, but in a bargain and sale which is by reason of the consideration given for the land, and that is the reason that a fee doth pass without the word "heirs;" and in this case a use shall not arise, for it appeareth his intent was to pass the land by way of feoffment when he saith, "Stand forth; I do here give thee this land," &c., which is void by way of feoffment, for the reservation preceding it is repugnant to the livery, for it cannot inure *in futuro*. FENNER. The reservation is void, and it shall inure to Eustace presently; and a use by parol upon good consideration is sufficient. CLENCH. It shall inure as a feoffment to the son, and a use shall arise to the father, &c., and so the intent of all the parties shall be observed.

At another day it was moved again; and POPHAM said they were all resolved that judgment shall be given for the plaintiff (who claimed under Eustace); and being moved to show the reasons of their judgment, they would not. But GAWDY said he was clear of opinion that a use shall not arise by parol. POPHAM and FENNER said they were clear of a contrary opinion; and POPHAM said that 7 Edw. VI., it was adjudged that a use may rise by parol, and he could show the record of it. FENNER said it was a good feoffment, but would say no more. And it was adjudged for the plaintiff.

Whereupon the defendant brought a writ of error in the Exchequer Chamber. And here the judgment was reversed.

Note that in the Queen's Bench POPHAM, C. J., held strongly that the consideration of blood raised a use to Eustace without writing (*escript*), and so he had the possession by 27 Hen. VIII. But GAWDY, FENNER, and CLENCH, JJ., were against this opinion, yet in the final judgment they agreed, because they took the words to amount to a feoffment with livery being upon the land, and the use to be to the feoffor and his wife for life, and afterwards to Eustace and his heirs.

But note that in the Exchequer Chamber EWINS, B., took the law in the same manner as the puisne judges in the Queen's Bench, and therefore was for affirming the judgment. But he was against POPHAM, C. J., that the use would not arise without a writing. BEAUMONT, J., took

this to be a feoffment to Eustace in fee, and the reservation to the father and his wife to be void for repugnancy, and therefore he would have had the judgment affirmed, and he was also against POPHAM.

But all the other judges, ANDERSON, C. J., PERYAM, C. B., CLARKE, B., WALMSLEY, J., and OWEN, J., all agreed that there was no feoffment executed, because the intent was repugnant to law; *i.e.*, to pass an estate to Eustace, reserving a particular estate to himself and his wife. And it could not be a use, because the purpose was not to raise a use without an estate executed, but by an estate executed which did not take effect. And they all agreed that if this was a use, still it would not arise upon natural affection without a deed.¹

PARVIS v. YEATON.

IN THE KING'S BENCH, MICHAELMAS TERM, 1614.

[Reported in 1 Rolle, 72.]

PARVIS brought replevin against Yeaton, and avowry was made for a rent, and it was pleaded that a fine was levied *inter alia* of the rent to the use of a stranger, and also a recovery; the plaintiff in his bar to the avowry pleaded "not comprised within the fine or recovery," upon which the avowant demurred.

Damport. Here it is pleaded that a fine was levied of the rent to the use of a stranger, and he has not averred that the use was declared by deed, for the use of a rent cannot be declared to a stranger without a deed *quod fuit concessum per curiam*; yet they held clearly that it may well be averred that the use was to a stranger without showing the deed or making mention of it. Same law of a reversion. And judgment was given accordingly against the plaintiff.

¹ Corben's Case, Moore, 544, pl. 722. [Hilary Term, 1694. In consideration of marriage, the father agreed by parol to stand seised of the land to the use of himself for his life, and afterwards to the use of his son and his heirs. The question was, if this altered the use to the son, because afterwards the father devised the land to his youngest son. And upon divers arguments in the Queen's Bench, and contrariety of opinion among the judges, it was adjourned to the Exchequer Chamber, where it was argued by *Cook* that the devise was good, and by *Bacon*, contra. And it is still pending.]

In *Jones v. Morley*, 1 Ld. Ray. 287, Lord Holt said, p. 290: "There are several ways to declare uses, either upon transmutation of the possession, or without it. If there is a transmutation of the possession, as by fine, feoffment, or recovery, the declaration will be sufficient without consideration or deed. But if there is no transmutation of possession, then there must be some obligatory agreement or valuable consideration; because the use depending entirely upon equity, the Chancellor will not compel performance where there is no transmutation of possession, unless there is a valuable consideration or binding agreement. Bargain and sale will raise a use upon payment of money. But consideration of blood will not raise a use without deed. *Callard v. Callard*, Moore, 687." — Ed.

SECTION II.

The Statute of Frauds.

STATUTE 29 CHARLES II., CHAPTER 3, SECTIONS 7, 8, AND 9.
1676.

[8 *Statutes at Large*, 406.]

VII. And be it further enacted by the authority aforesaid, That from and after the said four and twentieth day of June all declarations or creations of trusts or confidences of any lands, tenements, or hereditaments, shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect.

VIII. Provided always, That where any conveyance shall be made of any lands or tenements by which a trust or confidence shall or may arise or result by the implication or construction of law, or be transferred or extinguished by an act or operation of law, then and in every such case such trust or confidence shall be of the like force and effect as the same would have been if this statute had not been made; anything hereinbefore contained to the contrary notwithstanding.

IX. And be it further enacted, That all grants and assignments of any trust or confidence shall likewise be in writing, signed by the party granting or assigning the same, or by such last will or devise, or else shall likewise be wholly void and of none effect.



DOMINUS REX *v.* LADY PORTINGTON.

IN THE EXCHEQUER, 1692.

[*Reported in 1 Salkeld*, 162.]

ON a traverse to an inquisition *post mortem* *Annæ Barlow*, the jury found for the king, by reason the said Anne had devised her land to superstitious uses; but a case was made as followeth:—

Anne Barlow devised to the Lady Portington and her heirs, absolutely, without any trust; that she did it for the good of her soul, and that the devisee owned that this estate was not hers, but belonged to God and his saints. The question was, whether this devise could be averred to be in trust to a superstitious use. And the Court of King's

Bench held it could not,¹ and that both from the Statute of Frauds and from the nature of the thing. Supposing the devisee was a nun, it was considered how the law was then; and the court held that a monk now might purchase, because that part of the canon law, whereby his disability arose, is now abolished, and the common law takes no notice of him.

After this, viz. 26th May, 1693, an information was preferred in the Exchequer for a discovery, and an application of the devise to a use truly charitable.

And it was held, 1st, That the Statute of Frauds did not bind the king, but took place only between party and party;² 2dly, That the king, as head of the commonwealth, is obliged by the common law, and for that purpose intrusted and empowered to see that nothing be done to the disherison of the crown or the propagation of a false religion, and to that end entitled to pray a discovery of a trust to a superstitious use. 3dly, This use being superstitious, is merely void, and for that reason the king cannot have it. Yet, however, it is not so far void as that it shall result to the heir, and therefore the king shall order it to be applied to a proper use.³

GARDNER v. ROWE.

IN CHANCERY, BEFORE SIR JOHN LEACH, V. C., MAY 9, JUNE 19,
JULY 5, 1825.

[*Reported in 2 Simon & Stuart, 346.*]

THE VICE-CHANCELLOR.⁴ On the 1st of January, 1812, the Earl of Mount Edgcombe, by indenture of that date, granted to the bankrupt George Wilkinson the lease or set of a certain mine, called the Wheal Regent Mine, for a term of twenty-one years, for the considerations therein mentioned; and, by an indenture bearing date the 23d August, 1813, the bankrupt George Wilkinson, who, at the request of Rowe, had previously assigned five-fourteenths to one Brodrick, after reciting that his name was used in the said indenture of the 1st January, 1812, as a trustee for Joshua Rowe, assigned and transferred the remaining fifty-nine parts or shares to the said J. Rowe, for the residue of the

¹ 3 Salk. 334. — ED.

² Lord Hardwicke, referring to the case of *Rex v. Portington*, said, in *Adlington v. Cann*, 3 Atk. 154: "I own I am doubtful as to this doctrine, that the king is not bound by a statute unless he is expressly named." — ED.

³ But now *vide* Stat. 9 Geo. II. c. 36, whereby devises to charitable uses are void.

⁴ The statement of facts and the arguments of counsel have been omitted, the opinion of the Vice-Chancellor containing all that is essential to the understanding of the case. — ED.

said term. It is admitted that, prior to this assignment, an act of bankruptcy had been committed by the said George Wilkinson, and that a commission of bankrupt was duly issued against him in the month of November, 1813; and the present bill is filed by the assignees of Wilkinson under that commission against J. Rowe, and certain other persons claiming interest under him in the Wheal Regent Mine, for the purpose of having it declared that the lease of the Wheal Regent Mine is the property of the bankrupt. On the hearing of this cause the plaintiffs contended that it was established, by the evidence in the cause, that, at the time of the grant from Lord Mount Edgcumbe, it was the purpose of the bankrupt and J. Rowe that the bankrupt should hold the lease for his own benefit, and not as a trustee for J. Rowe; and the plaintiffs further contended, as a point of law, that if in fact it had been the purpose of the bankrupt and J. Rowe, at the time of the grant from Lord Mount Edgcumbe, that the name of the bankrupt should be used as a trustee for J. Rowe, yet that such trust could not prevail, because there was no written declaration of trust within the Statute of Frauds other than the indenture of 24th August, 1813, which, being executed by the bankrupt after his bankruptcy, could not operate to defeat the claim of his assignees.

It appeared to me at the hearing that I could not properly enter upon the consideration of this point of law without first coming to a conclusion upon the fact, whether the name of the bankrupt was or not used in the indenture of January, 1812, as a trustee for the defendant J. Rowe, and I directed an issue accordingly. At the trial of this issue, the jury found that the name of the bankrupt was used as a trustee for J. Rowe; and a motion having been made before me by the plaintiffs for a new trial of that issue, I refused to disturb the verdict.

The question which has now been mainly argued before me is, whether the indenture of the 24th August, 1813, having been executed by the bankrupt subsequent to his bankruptcy, can or not be received as against his assignees as a declaration of trust in writing. Upon a consideration of the several cases which have been referred to in the argument, it does not appear to me that any authority has been produced which is directly in point. All the cases establish that a bankrupt cannot, by any act subsequent to his bankruptcy, transfer any interest from his assignees. Thus, a bankrupt cannot defeat the interest of his assignees by a power of appointment. Can the bankrupt be said to have any interest in this mine at the time of his bankruptcy? He might have recovered possession of this mine by force of his legal title; but he would then have recovered, not in respect of his interest, but by converting a statute, made for the prevention of fraud, into an instrument of his own fraud. It is not disputed that this deed of August, 1813, would have prevailed against the assignees, as a declara-

tion of trust, if it had been executed before the bankruptcy. Yet a mere voluntary deed, executed before the bankruptcy, will not prevail against the assignees. This deed, therefore, in respect to the moral obligation on the trustee to give effect to his trust would not, in such case, have been considered as a mere voluntary deed. If, in respect of the moral obligation affecting the trustee, this declaration of trust would have prevailed against the assignees if executed the day before the bankruptcy, without any other consideration, I cannot find a principle why it should not prevail against the assignees, if executed the day after the bankruptcy, especially when it is considered that a trust does not pass by assignment in the bankruptcy. For these reasons, I am of opinion that the indenture of 24th August, 1813, though executed after the bankruptcy, is a good declaration of trust in favor of J. Rowe, within the Statute of Frauds. It has been slightly argued that the letters of the bankrupt do manifest a trust in writing within the Statute of Frauds; and, further, that a trust in this case is to be implied from the fact that Rowe actually directed the working of the mine, and paid the expenses of it; but I do not think it necessary to give any opinion on these points. The bill must therefore be dismissed, and with costs.¹

TIERNEY v. WOOD.

IN CHANCERY, BEFORE SIR JOHN ROMILLY, M. R., JUNE 3, 6, 27, 1854.

[*Reported in 19 Beavan, 330.*]

IN January, 1836, Alexander Wood purchased a house, a close of land and premises, situate at Little Hampton, in Sussex, for the sum of £490. They were conveyed to the plaintiff Tierney in fee, who admitted he held them in trust for Wood.

About the same time, Wood transferred a sum of stock into the plaintiff's name; but by his direction the plaintiff afterwards sold it out, and delivered the proceeds of the sale to Wood.

Soon after the purchase of the house, land, and premises, Wood delivered to the plaintiff a paper writing, signed by him, and dated January, 1837, in these words: "I hereby desire that, after my death, the stock now in the Bank of England, with the house and land now belonging to me at Little Hampton, shall be held by you, as you at present hold it, for the benefit of my wife Elizabeth Wood, during her life, and that after her death the same shall continue to be held by you as aforesaid, for the sole benefit of my daughter Mary Wood, in such

¹ Affirmed in 5 Russ. 258. *Ambrose v. Ambrose*, 1 P. Wms. 321, *accord*.
See also *Smith v. Howell*, 3 Stockt. 349. — ED.

sort that it shall be wholly and entirely free from all control of any person with whom she may intermarry. I further desire that in case my said daughter Mary should leave issue by any marriage which she may contract, the whole of the above property shall pass to such issue, in such manner as she may direct; but that, in case she should die without issue, the whole of the above property shall be equally divided among the lawful issue of my son Alexander Wood, born after 1834, he to have the interest and profits arising from the property during his life. If my son should die without issue, I desire that all the property may be sold, and the money be equally divided among my late brother's children now living at Old Craig," &c. "After the death of my wife, I wish my son Alexander to be paid £100 in money, or to be paid £5 a year during his life. If my son Alexander and my daughter Mary have both issue, let the property be equally divided among them; if they have no issue, give £100 to such charity as Mr. Jones's at St. Leonards. Let my son have my books on gardening, my shirts, or any of my clothes that may be of use to him, if he desire to have them.

"ALEXANDER WOOD. January, 1837.

"To the Rev. M. A. TIERNEY."

Alexander Wood, the elder, died in 1844, intestate, and the plaintiff allowed Mrs. Wood, his widow, to receive the rents of the premises, till her death in June, 1853.

Alexander Wood, the son and heir-at-law of Alexander Wood, the elder, and Mary Wood, the daughter, were living; but the latter has never been married, and questions having arisen as to the rights of the parties interested in the property of Alexander Wood, the elder, and as to the effect of the paper writing, the plaintiff instituted the suit to obtain the opinion of the court thereon.

Mr. Riddell, for the plaintiff.

Mr. Nichols, for Alexander Wood, the heir-at-law.

Mr. Fleming, for the daughter Mary.

THE MASTER OF THE ROLLS was of opinion that Mary Wood took an estate tail, but reserved his judgment as to the validity of the declaration of trust.

THE MASTER OF THE ROLLS. The question is, whether the document dated in January, 1837, created a good declaration of trust within the seventh section of the Statute of Frauds. That clause is in these words, or to this effect: That after the 24th of June, 1677, all declarations or creations of trusts, or confidences of any lands, tenements, or hereditaments, shall be manifested and proved by some writing, signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect.

The first question raised is, whether Alexander Wood is the person who is by law enabled to declare the trusts of these lands.

The second question is, whether, if he be, this is a declaration of trust, and such a one as can be acted upon.

There is no question but that on the purchase of this property by Alexander Wood, and the conveyance thereof to the Rev. M. A. Tierney, a resulting trust arose in favor of Alexander Wood, which, as it is expressly excepted by the eighth section of the Statute of Frauds, does not require to be evidenced by any writing. In the year 1836, therefore, and previous to the signing of this document, the property in question was vested in M. A. Tierney, in fee, in trust for Alexander Wood, in fee-simple. Alexander Wood, therefore, was the beneficial owner of this property, and Mr. Tierney had the mere naked legal interest in it. A distinction may be raised between the person who is by law enabled to declare, and the person who is by law entitled to create the trust. I consider, in the first place, who was by law entitled to create a trust in this property; and, first, I examine what, in such a state of things, would have been the effect of this document, so far as it relates to the stock, which had been transferred into the name of M. A. Tierney, if this had not been sold out afterwards by the direction of Alexander Wood, and the direction to pay the dividends had been complied with by Tierney. The result would have been that the relation of trustee and *cestui que trust* between Tierney and the person mentioned in the instrument would have been completed, so far as that stock was concerned, and the fact that the document had been a voluntary act on the part of Wood would not have prevented this court from acting upon it. The case of *Ex parte* Pye and Dubost, and the authorities referred to in *Bridge v. Bridge*,¹ decided by myself, establish this proposition. Those authorities show that the proper person to create the trust in personal property is the person in whom the beneficial interest of the property is vested; and the trust being created by the beneficial owner, the trustee is bound, and, if disposed to refuse, may be compelled, to obey it.

I am at a loss to find any reason which should cause this document to be effectual as a declaration of trust, so far as the stock is concerned, and not so, so far as the land is concerned. It is obvious that in both cases the person enabled by law to declare the trusts is the same. In the case before me, there can be no doubt that if Mr. Tierney had, in pursuance of this paper, signed a document to the same effect, stating that he held the property on the trusts therein mentioned, the trusts would, apart from any question on the construction of the document, have been fully and completely declared; and it is also clear, that if the trustee had declared that he held the property on any

trusts not recognized or sanctioned by Alexander Wood, the beneficial owner, such declaration of trust would have been insufficient and unavailing, and would have given no interest to the supposed *cestui que trust*. A declaration of trust in writing by Tierney following that of Wood would therefore have been merely formal, and would have been valid only so far as it followed his instructions, and would have been void to the extent, if any, that it departed from his directions. I think that the fair conclusion to be drawn from these considerations is, that the person to create the trust, and the person who is by law enabled to declare the trust, are one and the same; and that, consequently, the beneficial owner is the person by law enabled to declare the trust.

This is confirmed by the expression in the clause in the statute which relates to "the last will in writing," which can only apply to the beneficial owner. It may also be observed, that if the statute had intended that no trust should be valid, unless evidenced by a writing signed by the trustees, the simple and obvious course would have been to have so stated it; but the expression used is not "the trustee," but "the person by law enabled to declare the trust." That person is, I think, the beneficial owner; and I am of opinion that, apart from any question of the construction of the document, the fact of its having been signed by Wood, the beneficial owner, transmitted by him to Tierney, the legal owner, and by him acted upon, constitutes it a sufficient declaration of trust within the seventh clause of the statute, so far as that clause requires it to be signed "by the party who is by law enabled to declare such trust."

The next question is, whether the document itself, apart from the signature, is or purports to be a declaration of trust at all. It is contended that, if anything, it is a will imperfectly executed, that it contains no direction as to the present application of the rents, and that the rest of its contents savor of the directions contained in a will rather than of a direction how to apply the rents of the property; for that it is not to take effect till after the death of Alexander Wood, and that it contains directions for sale and the like, inconsistent with the nature and duties of the trust which M. A. Tierney had accepted. There is, undoubtedly, some force in these observations; but, on the whole, I think that this may be treated as a valid declaration of trust. Although it does not declare the whole trust, it declares the trust of a part, and it leaves the resulting trust untouched, except where it expressly interferes therewith. If this document had directed Mr. Tierney to pay the rent to Mr. Wood during his life, and had then proceeded as it does, this objection could not, in my opinion, have been sustained; but this omission is not sufficient to destroy the character of the rest of the interest, which, unless where it otherwise disposes of the beneficial interest in the property, leaves it untouched, under the resulting trust

vested in Mr. Wood. I am of opinion, therefore, that a good trust was evidenced by this writing within the Statute of Frauds.

The only remaining question is the interest which Mary Wood takes in the land so held in trust for her, and my opinion is, that she takes an estate tail.¹

¹ *Kronheim v. Johnson*, 7 Ch. D. 60, *accord.* — ED.

CHARITABLE TRUSTS are within the statute. *Adlington v. Cann*, 3 Atk. 141 ; *Muckleston v. Brown*, 6 Ves. 52 ; *Stickle v. Aldridge*, 9 Ves. 516 ; *Voorhees v. Protestant Church*, 17 Barb. 103 (overruling s. c. 8 Barb. 135).

CHATTELS REAL are, of course, within the statute. *Skett v. Whitmore*, Freem. Ch. 280 ; *Riddle v. Emerson*, 1 Vern. 108 ; *Bellasis v. Compton*, 2 Vern. 294 ; *Hutchins v. Lee*, 1 Atk. 447.

PERSONAL PROPERTY. The statute has obviously no application to trusts of personal property ; and the courts of New York, following their peculiar conception as to the nature of a mortgage upon land, have held that a trust in such a mortgage may be declared by parol. *Bucklin v. Bucklin*, 1 Abb. App. 242 ; *Bunn v. Vaughan*, 1 Abb. App. 253.

But if personal property is of such a nature as not to be transferable at common law by a parol transfer, a trust therein must be created by a conveyance of as formal a character as is requisite to pass the legal title. Accordingly, a pension granted by the crown to A. cannot be shown by parol to have been intended as a grant to A. in trust for B. *Fordyce v. Willis*, 3 Bro. C. C. 577. Lord Thurlow said, p. 587 : "I have been so accustomed to consider uses as averrable, that I should have thought it might be raised by parol. Perhaps, when looked into, the case may relate to feoffment, not to conveyances by bargain and sale, or lease and release."

REQUISITES OF MEMORANDUM IN WRITING. It has seemed expedient to insert in this collection of cases only those decisions arising upon the Statute of Frauds which are governed by principles peculiarly applicable to the sections relating to trusts. The cases turning upon the sufficiency of the memorandum in writing being governed by principles applicable equally to trusts and to contracts for the sale of land or goods, are excluded. For a clear and exhaustive statement of these principles see *Langdell, Sales, Index*, ¶¶ 57-78. See also *Browne, St. of Fr.* (4th ed.) §§ 98-100, 109-112.

MEMORANDUM MADE AFTER BILL FILED. The memorandum of a contract for the sale of goods must exist before action brought. *Langdell, Sales, Index*, ¶ 72.

But it has been held that a plaintiff is entitled to an immediate decree for the execution of a trust, if the existence and terms of the trust sufficiently appear in a defendant's answer. *McLaurie v. Parker*, 53 Ill. 340 ; *MacCubbin v. Cromwell*, 7 Gill & J. 157. But see *Dean v. Dean*, 1 Stockt. 425.

ASSIGNMENT OF A TRUST. The provision requiring the assignment of a trust to be manifested by a writing seems to have been disregarded in *Dow v. Jewell*, 18 N. H. 340, where it was held that the statute had no application to the assignment of a resulting trust. — ED.

DAVID C. HUTCHINSON v. WILLIAM TINDALL.

IN CHANCERY, NEW JERSEY, BEFORE PETER D. VROOM, C., OCTOBER TERM, 1835.

[*Reported in 2 Green, Chancery, 357.*]

THE CHANCELLOR.¹ The complainant seeks the decree of this court to set aside, as fraudulent and void, a deed from himself and wife to the defendant, for a farm of about one hundred and seven acres, in the county of Burlington. He alleges, that while in a state of great intoxication, at the dwelling-house of the defendant, where he was invited to drink and did drink spirituous liquor, he was requested by the defendant to sign a paper which was presented to him, and that he undertook to sign his name to it, but believes he did not sign it. A few days after he was informed by Nathaniel Dunn that he had signed the paper, and that it was a deed conveying to him his farm in fee-simple. He has no recollection of having signed such instrument, and must have been wholly or partially deprived of his understanding at the time. That the deed was wholly without a good or valuable consideration. The prayer of the bill is, that the deed and the record of it may be cancelled, or that the defendant may be compelled to pay to the complainant the full value of the farm.

The defendant says, in answer, that Hutchinson and wife made and executed the deed, for the consideration of two thousand dollars, expressed in the instrument; that it was acknowledged, on the day of its date, before Andrew Rowan, Esquire, by the grantors, and afterwards recorded. That the property was acquired with the money of Hutchinson's wife, who was the sister of defendant; and Hutchinson having become habitually intemperate, he was induced, at the solicitation of his sister, to consent to become a trustee for herself and children, in case the complainant and his wife should choose voluntarily to convey any part of the property to him for that purpose. That on the day the deed bears date the complainant and his wife came to defendant's house, and there voluntarily proposed to convey to defendant the premises in fee-simple for the benefit of the wife and children of the complainant, and desired a deed to be prepared for that purpose. That defendant prepared the deed, and read it over carefully to both Hutchinson and his wife, and then delivered it to Hutchinson, who with his wife went immediately to Andrew Rowan's to have it acknowledged. They afterwards returned and delivered the deed, executed and acknowledged, to the defendant. He expressly denies that Hutchinson was

¹ See *supra*, p. 79, note 1. — ED.

intoxicated or in any way deprived of his reason or understanding ; and alleges that he was not under the influence of intoxication, and was fully competent to dispose of his property, and that the deed was executed voluntarily, and with a full knowledge and understanding of its contents. He also expressly denies giving to complainant any spirituous or other intoxicating liquor until after he had prepared the deed and read it to complainant, nor, as he believes, until the complainant and his wife returned from Esquire Rowan's ; when, observing that the complainant was trembling for the want of his ordinary stimulus, he gave him some with the consent of his wife, believing it would be of service ; and, so far as the defendant knows, the complainant drank no other spirituous liquor that day.

The defendant further admits that he paid no part of the consideration money, and alleges that he holds the property for the use and benefit of the wife and children of the complainant, and that he has, with his own funds, paid off a mortgage on the premises of \$453.33, and caused it to be delivered up to be cancelled.

He does not object to a decree securing more satisfactorily to the wife and children of complainant their interests under the deed, nor to another trustee.

Much testimony has been taken on both sides to show the real situation of Hutchinson at and about the time the deed was executed. It appears that he was an intemperate man, sometimes drinking to excess, and carrying his intemperance so far as to occasion at times something like temporary derangement. He had a wife and five children, and owned a farm which, with the improvements on it, was worth upwards of \$2,000 ; and that he had received of his wife more than that amount of property, with which he was enabled to settle himself comfortably in the world. He had been much in liquor about the time the deed was given, and some of the witnesses state that on the morning of that day they saw him stagger as he walked. He got into his brother's house by holding on to the door-posts, and could not get into his wagon without assistance. The witnesses differ in regard to his capacity for business at the time he made the deed, as is usual in cases of this kind. My own conclusion, from the whole of the evidence, is, that he was not so far intoxicated as to be rendered incapable of transacting every kind of business, but that he was, nevertheless, considerably under the influence and excitement of ardent spirits, and not competent to attend to his concerns with prudence and judgment. He was, at least, partially intoxicated, and to such a degree that the court must apply to this case the principles that apply to similar cases when a party comes to have a contract set aside on the ground of intoxication.

These principles have frequently been discussed in this court, and appear to be settled. From all the cases, it may be laid down, —

1. That the court will hear any person who seeks relief on this ground. Formerly such hearing was denied. The party setting up such defence could not be heard. *Johnson v. Medlicott*.¹

2. That the fact of intoxication is not of itself sufficient to avoid a contract. *Cory v. Cory*.²

3. That, to avoid the contract, it must be shown, either that the intoxication was produced by the act or connivance of the person against whom the relief is sought, or that an undue advantage was taken of the party's situation. *Cooke v. Clayworth*; ³ *Adm'rs of Wilmurt v. Morgan*; ⁴ *Crane v. Conklin*; ⁵ *Pettinger v. Pettinger*.⁶

Considering these principles as settled, we are to inquire, in the first place, whether the intoxication of the party was procured in any way by the defendant. Upon this part of the case there is no doubt. The allegation, though made very directly in the bill, is shown to be wholly incorrect. No liquor was furnished by the defendant or any of the family, until in the afternoon, after the whole business was completed. Then a little was given, with the consent of Mrs. Hutchinson. Not only so, but there is no evidence that he tasted anything at Esquire Rowan's, or in going or returning thence. If, then, he was intoxicated, it was not through the agency of the defendant.

We are next to inquire whether any undue advantage was taken of his situation. Was the contract an unconscionable one? Was the act unreasonable or improper?

If this is to be considered an absolute conveyance, — as it appears to be on the face of it, — there having been no consideration paid, it would appear to be unreasonable. No one can presume that Hutchinson intended to give away all his farm; and if such pretension were set up by the defendant, I think the court would relieve against it.

If it is to be considered a deed of trust, as alleged by the defendant, then the case is essentially altered, for there is a good consideration to support the instrument. We find from the evidence that such a step had been contemplated. The complainant had been advised that very morning, by Dunn, one of his own witnesses, to give a deed of trust, or power of attorney, to one of his brothers; and he said he could not do that, but he wanted somebody to act for him. This same witness tells us three different times in the course of his examination that Hutchinson believed it was a deed of trust he was signing. Taking this to be the fact, I cannot undertake to say that such conveyance was unreasonable or improper. The property was purchased with the money of the wife. She had borne to him five children, who were to be taken care of and provided for. He was an intemperate man. He appeared

¹ Cited 3 P. Wms. 130.

² 1 Ves. Sen. 19.

³ 18 Ves. 12.

⁴ Opinion of Ch. Williamson, March, 1827.

⁵ Saxton, 346.

⁶ 2 Green Ch. 156.

to be sensible of his inability to manage his own concerns, at all times, in a proper way. If, under these circumstances, he thought proper to place this part of his property in the hands of a friend, for the benefit of his wife and children, a court of equity will hardly interfere to set it aside, on the plea of an improper advantage being taken of the party's situation.

The question then arises, How is this deed to be made a deed of trust? It is absolute on the face of it; how, then, can it be altered in its terms by parol proof?

If this were a resulting trust, the case would be clear of this difficulty, for such a trust may be established by parol. But it is a trust of a different character, coming within the provisions of the statute of frauds. Such a trust can never be established by parol, especially where there is no mistake or omission alleged in preparing the instrument. In some instances of that description, such proof has been received, and many judges are of opinion that the security intended to be guaranteed by the statute has been thereby already greatly diminished.

It is sought, in this case, to establish and define the trust by the answer of the defendant. In that, as has been seen, he states what he alleges to be the true consideration of the conveyance, and proffers his willingness to execute a declaration of trust, or secure the interest of the wife and children in any way the court may direct. Can this answer of the defendant be recognized as competent and sufficient evidence to establish the trust? A declaration of trust requires no formality, so that it be in writing, and have sufficient certainty to be ascertained and executed. It may be in a letter, or upon a memorandum; and it is not material whether the writing be made as evidence of the trust or not. The recital in a deed has been held to be a sufficient disclosure. *Bellamy v. Burrow*; ¹ *Deg v. Deg*; ² *Kirk v. Webb*.³

It has been held in the English courts that an answer to a bill may be a good declaration of trust. I am inclined to believe that if the present complainant had filed a bill claiming this deed to be a deed of trust, and praying that it might be so decreed, according to the original intention of the parties, that the answer of the defendant admitting the trust would have been good evidence of it. It would have amounted to a sufficient declaration of the trust. But it would seem to be different when a complainant seeks, on the ground of fraud, to set aside a deed absolute on the face of it, and confessedly without any actual consideration paid; for, as was well observed by the complainant's counsel, to suffer a defendant in such case to come in and avoid the claim by setting up a trust, would be to permit him to create a trust

¹ Cas. temp. Talb. 97.

² 2 P. Wms. 412.

³ Prec. Ch. 84; *Jeremy's Eq.* 22.

according to his own views, and thereby prevent the consequences of a fraud. And yet respectable authorities appear to consider that it may be done. *Hampton v. Spencer*¹ is certainly a strong decision in favor of the defendant. The only difference in the two cases is, that in the one case the complainant sought to redeem, and in the other he seeks to set aside the original conveyance; and I do not see that this difference varies the principle. The trust is not charged in the bill in either case.

The general rule in relation to answers, how far they shall be considered as evidence is, that when a party's answer is responsive to the bill, it shall be evidence; but when he undertakes to set up new, distinct, and affirmative matter, not fairly responsive to the bill, such matter must be proved. What shall be considered responsive to the bill is often a subject of controversy. Here the party is required by the bill to disclose what was the consideration of the deed. In answer, he states what consideration appears on the face of the deed, to wit, the sum of \$2,000. He is also required to disclose whether he has paid the consideration, or secured it to be paid. To this he answers that he paid no part of the consideration money expressed in the deed, and that there was none to be paid according to the original understanding between the parties to the said deed of conveyance, and that he holds the said premises, not for his own use or benefit, but for the use and benefit of the family of the said Hutchinson.

I incline to the opinion that this must be considered matter in avoidance, and not properly responsive to the bill. There is no trust charged, or anything in the nature of a trust. When the complainant inquired what was the consideration of the deed, and whether any part of it was paid or secured to be paid, he intended a money consideration. He had no reference to any use, declaration of trust, covenant, or understanding between the parties. It was simply as to the money paid or secured to be paid. He had a right to make inquiry as to that, and

¹ 2 Vern. 288 [Easter Term, 1693. *Hampton*, in consideration of £80 paid by the defendant *Spencer*, conveys a house, and surrenders a copyhold estate to the defendant and his heirs; the bill was for a reconveyance on payment of the remainder due of the £80 and interest. The defendant, by answer, insisted that the conveyance was absolute to him and his heirs, without any proviso, clause, or agreement that the plaintiff might redeem, &c.; but confessed it was in trust, that, after the £80 with interest was paid, defendant should stand seised for the benefit of the plaintiff's wife and children, although no such trust was declared by writing.

For the plaintiff it was insisted, that he having replied to the defendant's answer, who had not made any proof of such pretended trust, he was bound by his confession, that he was not to have the estate absolutely to himself, and no regard ought to be had to the matter set forth in avoidance of the plaintiff's demand, because the defendant had not proved it; yet the court decreed the trust for the benefit of the wife and children.] — Ed.

omit everything connected with it. The authorities on this subject are not entirely uniform, arising chiefly from the difficulty of applying the rule to the particular case. In *Gilb. L. E.* 45, there is a leading case decided by Lord Chancellor Cowper. It was a bill by creditors against an executor for an account. The executor stated in his answer that the testator left £1,100 in his hands, and that afterwards, on a settlement with the testator, he gave his bond for £1,000, and the other £100 was given him by the testator as a gift for his care and trouble. There was no other evidence of the £1,100 having been deposited with the executor. A replication was filed, and it was ruled that what was confessed and admitted by the answer was good against the defendant, but that he must establish by proof what was inserted by way of avoidance; or, in other words, he must be charged with the whole sum, unless he could prove the gift as he had stated it. In *Thompson v. Lamb*,¹ Lord Eldon said he was clearly of opinion, a person charged by his answer cannot by his answer discharge himself. And the same rule was admitted in *Boardman v. Jackson*.² In *Beckwith v. Butler*³ the court say, the answer of a defendant in chancery is not evidence where it asserts a right affirmatively in opposition to the plaintiff's demand. In such a case, he is as much bound to establish it by different testimony as the plaintiff is to sustain his bill. It would be monstrous indeed if an executor, when called upon to account, were permitted to swear himself into a title of part of the testator's estate. See also *Paynes v. Coles*; ⁴ *Bush v. Livingston et al.*⁵ In *Green v. Hart*,⁶ the doctrine was carried out to its fullest extent by the Court of Errors in New York. Hart charged in his bill that he paid a full and valuable consideration for the note indorsed to him by Green; and Green, in his answer to this charge, and to the interrogatory founded on it, alleged that part of the consideration was usurious. Chancellor Lansing held that this allegation was merely in avoidance, and was not sufficient without other proof. The decree was affirmed by the unanimous opinion of the Court of Errors. Mr. Justice Spencer, in delivering the judgment of the court, said: "I view the appellant's answer, charging usury, as insisting on a distinct fact by way of avoidance. The respondents having replied and given him an opportunity to prove the fact, and he having failed to do so, his answer is no evidence of the fact. This is a well-established principle in chancery proceedings, and will be found recognized in every treatise on evidence in that court." In *Hart v. Ten Eyck*,⁷ Chancellor Kent recognized these authorities, and approved the rule as perfectly just; saying that a contrary doctrine would be pernicious, and render it absolutely dangerous to employ the jurisdiction

¹ 7 Ves. 587.² 2 Ball & Beat. 382.³ 1 Wash. Rep. 224.⁴ 1 Munf. 373.⁵ 2 Caine's Cas. in Er. 66.⁶ 1 Johns. Rep. 580.⁷ 2 Johns. Ch. 62.

of this court, inasmuch as it would enable the defendant to defeat the plaintiff's just demand by the testimony of his own oath, setting up a discharge or matter in avoidance. That was the case of an account, and the question was, whether the charges for disbursements should be allowed upon the strength of the answer. It was adjudged that they could not. This decree was afterwards reversed in the Court of Errors, and upon this very point; but as there is no report of the case (other than a mere note in 1 Cow. 744), and the precise view of it cannot be ascertained, I am not disposed to consider it as overturning a whole series of decisions, such as have been referred to. Out of this last adjudication has grown the later one (in the same court) of *Woodcock v. Bennet*,¹ where a pretty broad and general answer was considered as responsive to the bill; but, on examination, I think this last case proves nothing to the point, for the answer is not more broad and spreading than the interrogatory.

It is to be remarked that, in all the authorities referred to, the matter set up in avoidance was one of personal benefit to the defendant. It was an attempt to make evidence for himself. In that particular this case is different; for the party seeks no benefit growing out of the trust. I am not prepared to say that this difference will alter the principle. If the facts alleged are not responsive to the bill, they are of no avail. It is the peculiar privilege of the complainant in this court to say how far and to what particular points of the case he will probe the conscience of the defendant, and thereby make him a witness. Advantage may be taken, at times, of this privilege, so as to hinder justice; but the evil is small compared with what would result from considering the whole of the defendant's answer as evidence, whether strictly responsive to the bill or not.

Independently of the answer, the allegations respecting the trust are not proved. The strongest evidence is that of Dunn; who states it as his belief that Hutchinson, when he executed the deed, thought it was a deed of trust. This might, with some of the other circumstances in the case, be sufficient to establish a trust of some kind; but it leaves us entirely ignorant of the nature of the trust intended; and if a trust be of so vague a character that a court cannot tell how to construe or to execute it, it is as none. There is some other evidence, but, in my view, very inconclusive. The facts that Hutchinson spoke of this deed afterwards, in the presence of one of the witnesses; that he was present when the agreement for a lease was made between Tindall and Hughes, and when Tindall paid off the mortgage to Cubberly, do not, either separately or in the aggregate, prove the fact of a trust, or the terms of it.

From this view of the law and the evidence there is no trust made

¹ 1 Cowen, 711.

out in this case, unless allegations of trust contained in an answer are exceptions to the general rule. The decision in *Vernon* would seem to favor this idea; but I cannot find, after a diligent search, that it has ever been followed. And, not being satisfied with its correctness, I feel unwilling to make it the foundation of a judicial decision. The result, then, is, —

1. That Hutchinson was, by reason of his situation, entitled to the protection of the court so far as to authorize an inquiry whether the intoxication was procured, or whether any advantage was taken of his situation.

2. That the deed being executed while in this state, for an alleged consideration on the face of it of \$2,000, which it is admitted is not to be paid and was not intended to be; and the trust asserted by the defendant in his answer not being proved, it cannot be sustained for the purposes of that trust; and no other purpose or trust being set up or pretended, the deed is without consideration, and void as against the grantor.

I am of opinion, therefore, that the deed ought to be delivered up to be cancelled, and that the property be reconveyed by Tindall to Hutchinson; and as I have no reason to believe that any actual fraud was intended, I think it right that Tindall should be allowed the amount he paid to discharge the Cobberly mortgage, together with interest on it, and that the cancellation and reconveyance be upon that condition.

I have considered this case under the conviction that the situation of Hutchinson was such, at the time of the transaction, as to entitle him to the protection of the court. In this matter of fact I may possibly be mistaken, although I am free to declare that, after anxiously reviewing the whole testimony, I see no reason to doubt the conclusion. If, however, I should be in error, it would not materially alter the rights of the parties; for if the trust, as set up by the answer, cannot be sustained, no benefit can accrue under or out of it to those who informally claim as *cestui que trusts*, and for whose interest alone the court has been asked to sustain this deed. No other trust or purpose is pretended, and, of course, none other can be established. The deed being, then, without consideration, could not inure to the benefit of the grantee. It would be decreed for the benefit of the grantor, as a resulting trust. And although it could not be so decreed with the present pleadings, the complainant might be permitted to file a supplemental bill, and have the benefit of such decree.

Costs are not allowed on either side, as against the other.

*Decree accordingly.*¹

¹ *Jones v. Slubey*, 5 Har. & J. 372, *accord.* — ED.

RICHARD A. URANN *v.* EZRA J. COATES AND ANOTHER.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, MARCH, 1872.

[Reported in 109 Massachusetts Reports, 581.]

COLT, J.¹ The bill charges that Benjamin Rand held the land, conveyed to him by the absolute deed of Isaac P. Rand, upon trust to apply the avails of it to the payment of certain incumbrances and debts due him, and to account for any surplus to Isaac P. Rand, the grantor, to whose right the plaintiff, as assignee, has succeeded. The writings by which it is claimed that this trust is declared are fully set forth; and it is alleged that, under the trust, sales have been made of more than enough to pay all demands and charges, leaving a surplus, to which the plaintiff is entitled.

The defendants file a plea denying that Benjamin, in his lifetime, held the land upon any such trust, or that any trust was devolved upon them, as his representatives, by his death. The purpose, no doubt, is to obtain first the decision of the court upon the question whether, upon the facts disclosed, any trust is raised which can be enforced; for, if no trust shall be found to exist, then the investigation of long and detailed accounts will be avoided. This is the point which was argued at the bar; and we proceed to its consideration, without regard to supposed irregularities in the pleadings.

The land in question was conveyed by an absolute quitclaim deed, dated on the 15th, but delivered on the 21st, day of July, 1865, to Benjamin, who then held large demands against Isaac P. Rand, secured by mortgage on the same premises. The evidence sufficiently proves that Benjamin orally agreed, at and before the time of the delivery of the deed of the equity, and as part of the transaction, that any surplus over and above his claim that might remain of the estate or its proceeds should belong to Isaac P. No written memorandum of the agreement was made before the delivery of the deed; but it was suggested, at the time, that Benjamin should put it in the shape of a memorandum, safely deposited, in case anything should happen to him. And Benjamin afterwards informed Isaac P. that, soon after the transaction, he made a memorandum of the agreement. No such paper was ever delivered to or came into the possession of Isaac P.; but, after the death of Benjamin, a writing of that description was found safely deposited in his bank trunk. By the terms of this writing, he agreed to pay over any balance of the estate remaining, substantially in accordance with the oral agreement. It was signed

¹ See *supra*, p. 79, note 1. — ED.

by Benjamin, and dated July 21, 1865; and underneath the first signature was an additional statement, also signed, in these words: "This memorandum is made by me for the use of my executor or administrator only. Neither Isaac P. Rand nor those claiming under him have any legal or equitable claim against me or my estate; but, upon the payment of my debt, interest, and all charges, as above mentioned, any balance shall inure to the benefit of Isaac P. Rand and those claiming under him."

We are of opinion that this writing is sufficient as a declaration of trust, within the meaning of our statute. It is much more formal and particular in its statement than declarations of this description by letter, by answer in chancery, affidavit, recital in bond or deed, or in pamphlet, which have all been held sufficient, and with reference to which it is held to be no objection that they were drawn up for another purpose, and not addressed to nor intended for the use of the *cestui que trust*. See cases cited in Browne on Stat. of Frauds, §§ 98, 99.

It is not essential that the memorandum relied on should have been delivered to any one as a declaration of trust. It is a question of fact, in all cases, whether the trust had been perfectly created; and upon that question the delivery or non-delivery of the instrument is a significant fact, of greater or less weight, according to the circumstances. If the alleged trust arises from mere gift, delivery of the writing by which it is declared is not always required as proof that the gift was perfected, for the court will consider all the facts bearing upon the question of intention; and it has been held that, if a party execute a voluntary settlement, and the deed recites that it is sealed and delivered, it will be binding on the settlor, even if he never parts with it, and keeps it in his possession until his death. *Bunn v. Winthrop*; ¹ *Perry on Trusts*, § 103, and cases cited. It must always, however, appear that the fiduciary relation is completely established, and not left as a matter of executory agreement only,—regard being had to the situation of the property, the relations of the parties, and the purposes and objects had in view. In this case, the verbal agreement in which the trust originated was made in consideration of the conveyance by Isaac P. of his interest in the real estate, and the trust is founded on a good consideration. The fact is of weight in aiding the court to carry out the intentions of the parties, and the want of a delivery of the memorandum becomes of less significance.

The law as thus laid down is to be found mainly in decisions under the words of the English statute, which requires that all declarations and creations of trust shall be manifested or proved in writing. These were the words of our earlier law (St. 1783, c. 37, § 3); and they remained until the first general revision of the statutes,—the require-

ment of the present statute being, that the trust shall be created or declared in writing. Gen. Sts. c. 100, § 19. The same change has been made in other States ; and, in those in which the question has been incidentally before the courts, the tendency is to rule that this abbreviation in the words does not change the law, and that " created or declared " are equivalent to " manifested or proved." Trusts may be created, in the first instance, in writing ; they more commonly originate in the oral agreements and transactions of the parties, and are subsequently declared in writing. Our statute embraces both descriptions. It had been settled by repeated decisions under the old statute, when this change was made, that an express trust was sufficiently declared, if shown by any proper written evidence disclosing facts which created a fiduciary relation. Under this construction, the additional words of the old statute seemed immaterial, and are omitted. And we are of opinion that no change in the meaning or effect of it was intended or made. Perry on Trusts, § 81, and cases cited.

In view of the law thus stated, the fact that there was no delivery of the memorandum in this case is not of controlling importance. It is impossible to account for its existence and safe preservation, unless there was an intention that it should be used, if necessary, to prove a trust. The statement that it is made for the use of the executor or administrator of the trustee implies this. The *cestui que trust* was informed of its existence ; and, by its terms, a perfect trust is declared. It is, indeed, declared that neither Isaac P. nor those claiming under him have any legal or equitable claim against the maker or his estate. But this statement, if such was its intention, cannot control the effect of the memorandum in establishing the trust. That results, as matter of law, from the proof. We are inclined to think that its intention was not to defeat an equitable claim to the proceeds of the estate conveyed, but only to protect the maker against personal responsibility beyond the actual receipts in administering the trusts.

*Decree for the plaintiff.*¹

¹ Jenkins v. Eldredge, 3 Story, 294 ; Bates v. Hurd, 65 Me. 180 ; McClellan v. McClellan, 65 Me. 500, *accord*.

See Cook v. Barr, 44 N. Y. 156. — Ed.

SECTION III.

Statute of Wills.

1 VICTORIA, CHAPTER 26, SECTION 9.

1837.

[77 *Statutes at Large*, 83.]

IX. AND be it further enacted, That no will shall be valid unless it shall be in writing and executed in manner hereinafter mentioned ; (that is to say,) it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction ; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary.

JOHNSON v. BALL.

IN CHANCERY, BEFORE SIR JAMES PARKER, V. C., DECEMBER 3, 8,
1851.

[*Reported in 5 De Gex & Smale*, 85.]

MR. GEORGE RUTTER LAMB cohabited with Mrs. Catherine Johnson for more than forty years before his death, and he had by her five children, namely, Caroline Manners, Jane Ball, Catherine Johnson, and Ellen Dennis, and Mary Ball, the deceased mother of Henry Ball, all of whom he acknowledged and treated as his children ; and he always maintained Mrs. Johnson and her children.

Mr. Lamb determined to make a provision for Mrs. Johnson and her four surviving children, and for Henry Ball, her grandson, to take effect after his death, and to settle upon them a policy of assurance for £2,000 on his own life, effected in the Equitable Assurance Office ; and, previously to the marriage of Mr. John Ball with the deceased daughter Mary Ball, Mr. Lamb informed Mr. John Ball that he intended to provide for Mrs. Johnson and her children by means of the policy. And afterwards, in the month of July, 1843, Mr. Lamb informed Mr. Ball and Mr. Manners, the husband of another of the children, that he was about to make his will, and that he intended to leave the policy upon trust for Mrs. Johnson and her children, and he asked them to

act as trustees for the children; which they consented to do. Mr. Lamb duly made his will on the 21st of February, 1844, and thereby, after appointing Messrs. Blacket, Hadland, and Bell executors thereof, and after bequeathing various legacies, he bequeathed the policy for £2,000 in the following words: "And I give to John Ball and Thomas Manners the policy in the Equitable, No. 25,098, on my life, to hold the same upon the uses appointed by letter signed by them and myself."

Mr. Ball, on the 4th of August, 1845, at the request and on the dictation of Mr. Lamb, wrote a letter, addressed to Messrs. Blacket, Hadland, and Bell, which Mr. Lamb signed in the presence of his daughter, Selina Clarissa Lamb, who signed her name as an attesting witness to his signature, at the request of Mr. Lamb. This letter was in the following terms:—

"To J. BLACKET, J. HADLAND, and JOHN BELL, Esquires:

"MY DEAR SIRs,—I made my last will and testament in 1844, wherein, amongst other things, I left my policy of life assurance, being No. 25,098, unto John Ball and Thos. Manners, to be delivered up to them for certain purposes, which they have agreed to carry out.

"Your obedient servant, G. R. LAMB.

"Signed this fourth day of August, 1845.

(Witness)

"SELINA CLARISSA LAMB."

Mr. Lamb then delivered this letter to Mr. John Ball, and desired him to take it to Mr. Blacket, or to Mr. Hadland or Mr. Bell, whom he had appointed his executors, and said that the policy would then be delivered up to them, Messrs. Ball and Manners, to be held by them in trust for the benefit of Mrs. Johnson and her children and grandson.

Mr. Ball thereupon requested Mr. Lamb to particularly specify the trusts upon which he and Mr. Manners were to hold the policy; and Mr. Lamb then dictated to Mr. Ball, who, at the request of Mr. Lamb, then wrote a memorandum or declaration of trust in the following words:—

"I wish my policy of insurance left to John Ball and Thomas Manners, to be divided as follows: I give to Mrs. Catherine Johnson the interest accruing from the sum total during the term of her natural life; and on her death I will that it be divided as follows: To Caroline, the wife of Thomas Manners, one equal share; to Jane, wife of Henry Ball, one equal share; to Catherine Johnson, daughter of Mrs. C. Johnson, one equal share; to Henry Ball, son of John Ball, one equal share; and to Ellen, wife of George Dennis, one equal share.

"(Signed, 4th August, 1845)

G. R. LAMB."

Mr. Lamb having signed the memorandum or declaration of trust, delivered it to Mr. John Ball, in order that the same might be signed and retained by him and Mr. Manners.

The above letter and memorandum, both dated the 4th of August, 1845, were signed by Mr. Lamb at the same interview, in the presence of Mr. John Ball and of Selina Clarissa Lamb. Both documents related to the policy of assurance bequeathed by the will, and remained in the possession of Messrs. John Ball and Thomas Manners until the death of Mr. Lamb. The policy continued in the possession of the testator until his death.

No letter or memorandum relating to the uses or trusts upon which the policy was to be held was ever signed by Mr. Lamb and Mr. J. Ball and Mr. T. Manners, or any one of them, either before or after the date of Mr. Lamb's will, except the two above-mentioned documents. Mr. Lamb, the testator, made a codicil to his will, which did not affect the bequest of the policy.

Mr. Lamb died on the 19th of June, 1850; and his will and codicil were, on the 24th of September, 1850, duly proved in the Prerogative Court of Canterbury by Messrs. Hadland and Bell alone.

Messrs. Hadland and Bell possessed themselves of the personal estate and effects of the testator, and thereout paid the testator's funeral and testamentary expenses and debts, and they also paid the several legacies bequeathed by the will, except the legacy of the policy.

As the acting executors of the will, they received from the Equitable Assurance Company the £2,000 secured by the policy, with bonuses thereon.

This was a claim by Mrs. Catherine Johnson, by which, after stating the above circumstances, she alleged that the trusts of the policy were effectually declared by the testator in his lifetime in favor of herself and children and grandson, by the memorandum or declaration of trust above set forth. The claim alleged that the executors of the testator were trustees of the proceeds of the policy received by them, and she claimed to have the proceeds of the policy of insurance paid into the bank to the credit of this cause; and that the said memorandum or declaration of trust of the 4th of August, 1845, might be established, and the trusts thereof performed and carried into execution under the direction of the court; and for a declaration of the rights of all parties interested in the policy.

Mr. Bacon and *Mr. Speed*, for the plaintiff.

Mr. Rogers, for the defendants, the children of the testator and of the plaintiff, and for Henry Ball, the grandchild, in support of the plaintiff's case.

Mr. Shebbeare, for Messrs. Ball and Manners, in support of the plaintiff's claim.

*Mr. Daniel and Mr. Bates, for the executors of the testator's will.*¹

THE VICE-CHANCELLOR. The testator in this cause gives the policy of assurance in question to John Ball and Thomas Manners, "to hold the same upon the uses appointed by letter signed by them and myself." It is not suggested that any such letter as is here referred to existed when the will was made; the letters relied on by the plaintiff are those signed by the testator some time afterwards. The testator's language appears to point at some letter already signed by him and the trustees; but even supposing it to refer to a letter to be afterwards signed, it is impossible to give effect to any such letter as a declaration by the testator of the trusts on which he had bequeathed the policy to his trustees. To give them any such effect would be to receive, as part of or as codicils to the will, papers subsequent in date to the will, which are unattested, and which have not been and could not be admitted to probate. A testator cannot by his will prospectively create for himself a power to dispose of his property by an instrument not duly executed as a will or codicil. The decisions to this effect on devises of real estate under the Statute of Frauds are clearly applicable, and have been applied, under the existing law, to testamentary dispositions of any kind. *Countess de Zichy Ferraris v. Marquis of Hertford*; ² *Briggs v. Penny*.³

It was argued that the policy is bequeathed to the trustees; and that, as they admit a trust in favor of the plaintiff and her children, the court will execute the trust so admitted. But the trustees have no interest in the policy which enables them to admit any such trust. The bequest is to them expressly upon trusts to be appointed by the testator; and as the testator has made no effectual appointment, the trustees, if the bequest has not wholly failed, are trustees for the residuary legatees, and cannot, by their admission, create any other trust. Cases in which there is no trust appearing on the will, and where the court establishes a trust on the confession of the legatee, have no application to the present; nor, as it appears to me, have those cases cited in the argument, in which the will refers to a trust created by the testator by communication with the legatee antecedently to or contemporaneously with the will.

The testator's letters cannot operate as a gift or settlement by act *inter vivos*; because they do no more than refer to the bequest made by the will, and declare the purpose for which the policy was to be held by the trustees to whom it was left. The letters were merely in furtherance of the testamentary dispositions; and if the will had been revoked, the letters must have dropped with it.

¹ The arguments of counsel are omitted. — Ed.

² 3 Curt. 468; s. c. on appeal, *nom.* *Croker v. Marquis of Hertford*, 4 Moore P. C. 355.

³ 3 De G. & Sm. 525.

There can be no doubt that it was the testator's deliberate intention to make a provision, by means of the policy, for the plaintiff and her children; and it is with regret that the court is compelled to declare that he has failed in carrying his intention into effect.¹

JUNIPER v. BATCHELOR.

IN CHANCERY, BEFORE SIR G. M. GIFFARD, V. C., JUNE 26, 1868.

[*Reported in Weekly Notes* (1868), 197.]

CHARLES JUNIPER, by a will dated the 14th of March, 1864, devised and bequeathed all his real and personal estate to W. Batchelor, T. Batchelor, T. Caffyn, and T. B. Penfold, their heirs, executors, administrators, and assigns absolutely, as tenants in common, devised to them all the estates vested in him as trustee and mortgagee, and appointed them his executors. On the 20th of January, 1866, he made his last will in substantially the same terms, but in favor of the said W. Batchelor and T. Batchelor, J. Burster (instead of T. Caffyn), and the said T. B. Penfold. On the 6th of June, 1866, he died, and his will was proved by T. Batchelor, Burster, and Penfold only. Shortly after his death a tin box was found soldered up, in which, when opened, were discovered four letters, purporting to be signed by the testator, all dated the 14th of March, 1864, and in the same terms, and addressed to W. Batchelor, T. Batchelor, T. Caffyn, and T. B. Penfold respectively. Each letter was to the effect that the writer wished the person addressed to retain for himself out of the estate £200, and that, after payment of succession and legacy duties and expenses, the surplus which would be realized by public auction sale of his estate should be given to the Sussex County Hospital, Brighton. The bill was filed by the heir-at-law and customary heir of the testator, alleging that the real and personal estate was devised to the four devisees on a concealed trust for charitable purposes, which they promised and agreed to perform, and prayed for a declaration that the devise and bequest might be declared void, or that the devisees might be declared trustees for the plaintiffs, and might be decreed to convey and surrender the same. T. Batchelor said he agreed to be the testator's executor, but the testator said nothing to him about the disposition of his property. Burster said the same, and that the testator said something about letters, but he (Burster) did not know what he meant. Testator said he had quar-

¹ *Boson v. Statham*, 1 Eden, 508; *Briggs v. Penny*, 3 De G. & Sm. 525; *Thayer v. Wellington*, 9 All. 283, *accord.* — ED.

relled with Caffyn. Penfold said he promised to be the testator's executor, and testator said "there would be letters found," but did not explain what he meant. On the 12th of July, 1866, the testator's real and personal estate was conveyed by the four trustees to a trustee for the three who had proved the will.

Kay, Q. C., and *Ince*, for the plaintiffs.

Druce, Q. C., and *G. N. Colt*, for the defendants, the devisees, and *Wickens*, for the defendant, the Attorney-General, were not called upon.

THE VICE-CHANCELLOR said he did not think the communications had gone far enough to bring the case within the authorities which had been cited. The testator asked these devisees to be his executors. They said they would. Nothing intelligible was said about letters; nothing about the will of the testator; nothing about his intention. If there had been no letters, it was conceded that the devisees would have been entitled. Then how could it be contended that they made any difference, if they were not communicated in some shape or form to these persons? Some knowledge must be made out of the testator's intention, sufficient to have made it a fraud for these devisees to retain the property. Nothing of that kind had been established; and the bill must be dismissed with costs.¹

¹ *Wallgrave v. Tebbs*, 2 K. & J. 313; *Tee v. Ferris*, 2 K. & J. 354, *accord.* — ED.

CHAPTER IV.

RESULTING TRUSTS.

SECTION I.

Where an intended Trust cannot take Effect.

ANONYMOUS.

IN CHANCERY, BEFORE LORD PARKER, C., MICHAELMAS TERM, 1720.

[Reported in Comyns, 345.]

A MAN seised in fee made a settlement of lands to trustees and their heirs, upon trust that they should sell the lands, and pay out of the money arising therefrom such particular sums to such particular persons, and the residue (after the sum of £200 to be paid to such person as he by any writing under his hand should direct) to B., his executors or administrators, and afterwards died without any direction for the payment of the £200. It was resolved that B. should not have the £200, but the heir of him who made the settlement.²

CARRICK v. ERRINGTON.

IN CHANCERY, BEFORE LORD KING, C., TRINITY TERM, 1726.

[Reported in 2 Pere Williams, 361.]

EDWARD ERRINGTON, seised in fee of lands in Northumberland, by lease and release in 1714 settled the same to the use of himself for life,

¹ s. c. *nom.* Emblyn v. Freeman, Prec. Ch. 541. — Ed.

² In *Collins v. Wakeman*, 2 Ves. Jr. 683, *Fitch v. Weber*, 6 Hare, 145, *Flint v. Warren*, 16 Sim. 124, *Att'y-Gen. v. Dean*, 24 Beav. 679, 8 H. L. 369, property being given upon trusts to be declared, and the trusts not being afterwards declared, there was a resulting trust.

In *Taylor v. Haygarth*, 14 Sim. 8, for the same reason, there being no heir or next of kin of the testator, the real estate went to the trustee and the personal estate to the crown.

In *Brown v. Jones*, 1 Atk. 188, *Sydney v. Shelley*, 19 Ves. 352, a limitation to trustees for a term of ninety-nine years, upon trusts to be declared, was held to create a trust term to attend the inheritance, although no trust was declared, since otherwise the general purposes of the instrument would have been defeated. — Ed.

remainder to his first, &c., son in tail male successively, remainder to Thomas Errington a Papist for life, remainder to trustees and their heirs during the life of Thomas Errington the Papist to preserve contingent remainders, remainder to his first, &c., son in tail male successively, remainder to William Errington a Protestant for life, remainder to trustees and their heirs during the life of William Errington to preserve, &c., remainder to his first, &c., son in tail male successively, remainder to his own right heirs.

Edward Errington died without issue, leaving sisters who were his heirs-at-law and Protestants; and one of the questions was, what should become of this estate, and who should take the profits thereof during the life of Thomas Errington the Papist, whether the heir-at-law of Edward the grantor, or the remainder-man?

And first it was ruled by Lord Chancellor, and given up by the counsel on all sides, that since the great case of Roper and Radcliffe,¹ which was resolved in the House of Lords, the latter clause of the statute of 11 & 12 Will. III. cap. 4, for preventing the growth of Popery, and which disables a Papist from taking any land, or trust or interest in or out of land, by purchase, must not only be understood to prevent a Papist from buying lands, but also to disable him from taking any lands by purchase, and therefore in the aforesaid case, where the devise was of lands to be sold for the payment of debts, and the surplus to the Papist, forasmuch as the Papist would be entitled to the surplus of the estate, paying the debts, this was construed a void devise as to the Papist.

2dly, That if the case were no more than that lands were limited by lease and release to the use of A. a Protestant for life, remainder to B. a Papist for life, remainder to C. a Protestant, and A. dies, in such case the remainder to B. the Papist being void, the next remainder to C. shall take effect presently, in the same manner as if a remainder were limited to a monk for life, or to one who refuses to take; or if such remainder-man were dead, and there had never been such limitation.²

In the next place, the court declared that the said statute extending to trusts as well as legal estates, the remainder limited to trustees to preserve contingent remainders, as to such part and so much as was declared to be in trust to let Thomas Errington the Papist take the rents and profits during his life, was a void trust; but that the trust to preserve contingent remainders to the first, &c., son of Thomas Errington the Papist was good.

3dly, In the principal case it was held, that in regard if the estate should go to the subsequent remainder-man William Errington the

¹ 9 Mod. 167, 181; 10 Mod. 230, and 1 Bro. P. C. 450.

² *Vide* Thornby v. Fleetwood, 1 Stra. 318.

Protestant, it could not afterwards go back to any sons of Thomas Errington the Papist who might be Protestants; and this being a hardship and wrong to a third person, therefore the rents and profits of this estate, during the life of Thomas Errington the Papist, ought to go back to the sisters and heirs-at-law of Edward Errington the grantor, and that these sisters and heirs-at-law of Edward Errington being Protestants, should have the rents of the premises from the death of Edward Errington the grantor.

Notwithstanding it was strongly objected, that the conveyance being by way of lease and release, the whole estate passed out of the grantor, and could not return to him again, but must go to the next in remainder capable of taking; and further, that since this was a trust in the trustees during the life of Thomas Errington the Papist, and a trust was a creature of equity, the court, which had the power and direction thereof, ought to let William Errington the next remainder-man into the possession of the premises, and that in case Thomas Errington the Papist should leave Protestant sons, then the court would order the trust for the benefit of such son, and secure the profits to him.

But Lord Chancellor said, this would be making use of an extraordinary power of directing and displacing estates, which he would not take upon himself to do; and that the intent and meaning of the statute was in a more plain and easy manner complied with, by construing the estates and trusts to be void, as to the Papist only, but not to let the next Protestant remainder-man into possession before his time, so as to prejudice or endanger a third person, the son or sons of Thomas Errington the Papist, &c., wherefore let the heir-at-law of the grantor take the estate for so long a time only, as the same is undisposed of by the grantor.¹

4thly, It was held that as to the former clause of this statute, which disables Papists from taking by descent, unless they conform within six months after eighteen, if they (the Papists) were above six months after eighteen before the making the statute, so as it was impossible to comply with the statute, then such persons are not within the clause, nor shall suffer by it.²

This decree was afterwards affirmed³ on an appeal in the House of Lords.⁴

¹ *Hopkins v. Hopkins*, Cas. temp. Tab. 44, and another branch of the same case, 1 Atk. 597.

² *Vide Hill v. Filkins*, 2 P. Wms. 6.

³ 3 Bro. P. C. 412.

⁴ In the following cases there was a resulting trust, by reason of the illegality of the intended trust: *Roper v. Radcliffe*, 9 Mod. 171; *Hopkins v. Hopkins*, 1 Atk. 581, 597; *Arnold v. Chapman*, 1 Ves. 108; *Page v. Leapingwell*, 18 Ves. 463; *Tregonwell v. Sydenham*, 3 Dow, 194; *Jones v. Mitchell*, 1 S. & S. 290; *Pilkington v. Boughhey*, 12 Sim. 114; *Turner v. Russell*, 10 Hare, 204; *Morris v. Owen*, W. N. (1875), 134;

DIGBY v. LEGARD.

IN CHANCERY, BEFORE LORD BATHURST, C., TRINITY TERM, 1774.

[*Reported in 3 Peere Williams, 22, note (1).*]

E. B. devised her real and personal estate to trustees, in trust to sell, to pay debts and legacies, and to pay the residue to five persons, to be equally divided between them, share and share alike. One of the residuary legatees died in the lifetime of the testatrix. The court, at the hearing, and afterwards upon a rehearing, held that this was a resulting trust, as to the share in the real estate of the residuary legatee who died in the testatrix's lifetime, for the benefit of the heir-at-law. Reg. Lib. A. 1773, fol. 495, and 1774, fol. 325.¹

MORICE v. THE BISHOP OF DURHAM.

IN CHANCERY, BEFORE LORD ELDON, C., MARCH 18, 20, 1805.

[*Reported in 10 Vesey, 521.*]

THIS cause came on upon an appeal by the defendant, the Bishop of Durham, from the decree of the Master of the Rolls.

Ann Cracherode, by her will, dated the 16th of April, 1801, and duly executed to pass real estate, after giving several legacies to her next of kin and others, some of which she directed to be paid out of the produce of her real estate, directed to be sold, bequeathed all her personal estate to the Bishop of Durham, his executors, &c., upon trust to pay her debts and legacies, &c.; and to dispose of the ultimate residue to such objects of benevolence and liberality as the Bishop of Durham in his own discretion shall most approve of; and she appointed the Bishop her sole executor.

The bill was filed by the next of kin to have the will established except as to the residuary bequest, and that such bequest may be declared void. The Attorney-General was made a defendant. The

Haywood v. Craven, 2 Law Rep. (N. C.) 557; Huckaby v. Jones, 2 Hawks, 120; Stevens v. Ely, 1 Dev. Eq. 493; Sorrey v. Bright, 1 Dev. & B. Eq. 113; Thompson v. Newlin, 3 Ired. Eq. 338; Lemmond v. Peoples, 6 Ired. Eq. 137.

See Young v. Grove, 4 C. B. 668; Doe v. Harris, 16 M. & W. 517. — ED.

¹ Cruse v. Barley, 3 P. Wms. 20; Ackroyd v. Smithson, 1 Bro. C. C. 503; Hutcheson v. Hammond, 3 Bro. C. C. 128; Spink v. Lewis, 3 Bro. C. C. 355; Williams v. Coade, 10 Ves. 500; Davenport v. Coltman, 12 Sim. 610; Hawley v. James, 5 Paige, 318, *accord.* — ED.

Bishop, by his answer, expressly disclaimed any beneficial interest in himself personally.¹

Mr. Richards and *Mr. Martin*, in support of the appeal.

The Attorney-General (*Hon. Spencer Perceval*) and *Mr. Mitford*, against the decree.²

THE LORD CHANCELLOR (ELDON). This, with the single exception of *Brown v. Yeall*,³ is a new case. The questions are, 1st, Whether a trust was intended to be created at all? 2dly, Whether it was effectually created? 3dly, If ineffectually created, whether the defendant, the Bishop of Durham, can, according to the decisions, and upon the authority of those decisions, take this property for his own use and benefit. As to the last, I understand a doubt has been raised in the discussion of some question bearing analogy to this in another court, — how far it is competent to a testator to give to his friend his personal estate, to apply it to such purposes of bounty not arising to trust as the testator himself would have been likely to apply it to. That question, as far as this court has to do with it, depends altogether upon this: if the testator meant to create a trust, and not to make an absolute gift, but the trust is ineffectually created, is not expressed at all, or fails, the next of kin take. On the other hand, if the party is to take himself, it must be upon this ground, according to the authorities, — that the testator did not mean to create a trust, but intended a gift to that person for his own use and benefit; for if he was intended to have it entirely in his own power and discretion whether to make the application or not, it is absolutely given, and it is the effect of his own will and not the obligation imposed by the testament: the one inclining, the other compelling, him to execute the purpose. But if he cannot, or was not intended to, be compelled, the question is not then upon a trust that has failed, or the intent to create a trust; but the will must be read as if no such intention was expressed or to be discovered in it.

Pierson v. Garnet, and the other cases of that class, do not bear upon this in any degree; for the question, whether a trust was intended, arose from two or three circumstances, which must all concur where there is no express trust. *Prima facie* an absolute interest was given, and the question was, whether precatory, not mandatory, words imposed a trust upon that person; and the court has said, before those words of request or accommodation create a trust, it must be shown that the object and the subject are certain; and it is not immaterial to this case that it must be shown that the objects are certain. If neither the objects nor the subject are certain, then the recommendation or request does not create a trust; for of necessity the alleged trustee is to execute the trust, and the property being so uncertain and indefinite, it may be

¹ The statement of facts is taken from the report of the case in 9 Ves. 399.

² The arguments of counsel are omitted. — ED.

³ 7 Ves. 50, n.

conceived the testator meant to leave it entirely to the will and pleasure of the legatee, whether he would take upon himself that which is technically called a trust. Wherever the subject to be administered as trust property, and the objects for whose benefit it is to be administered are to be found in a will, not expressly creating trust, the indefinite nature and *quantum* of the subject, and the indefinite nature of the objects, are always used by the court as evidence that the mind of the testator was not to create a trust; and the difficulty that would be imposed upon the court to say what should be so applied, or to what objects, has been the foundation of the argument that no trust was intended.

But the principle of those cases has never been held in this court applicable to a case where the testator himself has expressly said he gives his property upon trust. If he gives upon trust, hereafter to be declared, it might perhaps originally have been as well to have held that, if he did not declare any trust, the person to whom the property was given should take it. If he says he gives in trust, and stops there, meaning to make a codicil or an addition to his will, or, where he gives upon trusts which fail, or are ineffectually expressed, in all those cases the court has said, if upon the face of the will there is declaration plain that the person to whom the property is given is to take it in trust; and, though the trust is not declared, or is ineffectually declared, or becomes incapable of taking effect, the party taking shall be a trustee; if not for those who were to take by the will, for those who take under the disposition of the law. It is impossible, therefore, to contend that, if this is a trust ineffectually expressed, the Bishop of Durham can hold for his own benefit. I do not advert to what appears upon the record of his intention to the contrary, and his disposition to make the application; for I must look only to the will, without any bias from the nature of the disposition, or the temper and quality of the person who is to execute the trust.

The next consideration is, whether this is a trust effectually declared; and, if not as to the whole, as to part. I put it so; as it is said, if the word "benevolence" means charity, and "liberality" means something different from that idea, which in a court of justice we are obliged to apply to that word "charity" (and, I admit, we are obliged to apply to it many senses not falling within its ordinary signification), there is a ground for an application in this case partially, if it cannot be wholly, to charity. It does not seem to me upon the authorities, particularly the Attorney-General v. Whorwood,¹ that the argument for a proportionate division, or a division of some sort, would be displaced. I take the result of that case to be that the substratum of that charity failed, and all those partial dispositions that would have been good charity, if not

¹ 1 Ves. 534; Grieves v. Case, 1 Ves. 548 and n., 554.

connected with that, failed together with it. It has been decided upon that principle, that, though money may be given to an infirmary or a school, yet, if that bequest is connected with a purpose of building an infirmary or school, and the money is then to be laid out upon it so built, the purpose, which is the foundation, failing, the superstructure must fail with it. The Attorney-General *v.* Doyley¹ is almost the only case that has been cited for a proportional division. The testator expressly directed the trustees to dispose of his estate to such of his relations, of his mother's side, who were most deserving, and in such manner and proportions as they should think fit to such charitable use as they should think most proper and convenient; and the court, which has taken strong liberties upon this subject of charity, though the manner and proportion were left to certain individuals, held that equality is equity, and there should be an equal division; but it is expressly declared that those who took were persons who could take under a bequest to charitable uses, and there was no difficulty in that case in saying, those words must be construed according to the habit and allowed authorities of the court.

The only case decided upon any principle that can govern this is *Brown v. Yeall*,² which applies strongly. I do not trust myself with the question whether the principle was well applied in that instance, but the decision furnishes a principle which the court must endeavor well to apply in cases that occur. I do not hesitate to say I entertain doubt, not of the principle upon which that case was decided, but whether it was well applied in that instance. Mr. Bradley was a very able lawyer, yet he mistook his way, as Serjeant Aspinall had not long before. Mr. Bradley gave a great portion of his fortune to accumulate for many years, and, meaning that it should be disposed of to charitable purposes, constituted a fund, expressly stating that his purpose was a charitable purpose, and confirming that by directing that charitable purpose to be carried on, as to the mode of executing it, by that court which, according to the Constitution of the country, ordinarily administers property given to charitable uses. In his opinion, therefore, independent of particular authority, there was a principle, suggested by all other cases of trust, that if a trust was declared in such terms that this court could not execute it, that trust was ill-declared, and must fail, for the benefit of the next of kin. The principle upon which that trust was ill-declared is this. As it is a maxim that the execution of a trust shall be under the control of the court, it must be of such a nature that it can be under that control, so that the administration of it can be reviewed by the court; or, if the trustee dies, the

¹ 4 Vin. 485; ² Eq. Ca. Ab. 184. Stated from the Register's book, in the note, 7 Ves. 58.

² 7 Ves. 50, n.

court itself can execute the trust; a trust, therefore, which, in the case of mal-administration, could be reformed, and a due administration directed, and then, unless the subject and the objects can be ascertained upon principles familiar in other cases, it must be decided that the court can neither reform mal-administration nor direct a due administration. That is the principle of that case. Upon the question whether that principle was well applied in that instance, different minds will reason differently. I should have been disposed to say that, where such a purpose was expressed, it was not a strained construction to hold that the happiness of mankind intended was that which was to be promoted by the circulation of religious and virtuous learning; and, the testator having stated that to be the charitable purpose, which unquestionably was so, the distribution of books for the promotion of religion, the court might have so understood him; and the testator having not only called it a charitable purpose, but delegated the execution to this court, ought to be taken to have meant that.

Upon these grounds in a subsequent case, *The Attorney-General v. Stepney*,¹ as to the Welch charities, it appeared to me too much, considering the Society in this country for the Propagation of the Gospel, &c., to say a trust for the circulation of bibles, prayer-books, and other religious books was not good. Then, looking back to the history of the law upon this subject, I say, with the Master of the Rolls, that a case has not been yet decided in which the court has executed a charitable purpose, unless the will contains a description of that which the law acknowledges to be a charitable purpose, or devotes the property to purposes of charity in general. Upon those cases in which the will devotes the property to charitable purposes, described, observation is unnecessary. With reference to those in which the court takes upon itself to say it is a disposition to charity, where in some the mode is left to individuals, in others individuals cannot select either the mode or the objects, but it falls upon the king, as *parens patriæ*, to apply the property, it is enough at this day to say, the court, by long habitual construction of those general words, has fixed the sense; and, where there is a gift to charity in general, whether it is to be executed by individuals selected by the testator himself, or the King, as *parens patriæ*, is to execute it (and I allude to the case in *Levintz v. The Attorney-General v. Matthews*²), it is the duty of such trustees on the one hand, and of the crown upon the other, to apply the money to charity in the sense which the determinations have affixed to that word in this court; viz., either such charitable purposes as are expressed in the statute (43 Eliz. c. 4), or to purposes having analogy to those. I believe the expression "charitable purposes," as used in this court, has been applied to many acts described in that statute, and analogous to those,

¹ 10 Ves. 22.² 2 Lev. 167.

not because they can with propriety be called charitable, but as that denomination is by the statute given to all the purposes described.

The question, then, is entirely whether this is according to the intention a gift to purposes of charity in general as understood in this court ; such that this court would have held the bishop bound, and would have compelled him to apply the surplus to such charitable purposes as can be answered only in obedience to decrees where the gift is to charity in general ; or is it or may it be according to the intention to such purposes going beyond those partially or altogether which the court understands by “ charitable purposes ;” and, if that is the intention, is the gift too indefinite to create an effectual trust to be here executed ? The argument has not denied, nor is it necessary, in order to support this decree, that the person created the trustee might give the property to such charitable uses as this court holds charitable uses within the ordinary meaning. It is not contended, and it is not necessary, to support this decree, to contend, that the trustee might not consistently with the intention have devoted every shilling to uses in that sense charitable, and of course a part of the property. But the true question is, whether, if upon the one hand he might have devoted the whole to purposes in this sense charitable, he might not equally according to the intention have devoted the whole to purposes benevolent and liberal, and yet not within the meaning of charitable purposes as this court construes those words ; and, if according to the intention it was competent to him to do so, I do not apprehend that under any authority upon such words the court could have charged him with mal-administration, if he had applied the whole to purposes, which, according to the meaning of the testator, are benevolent and liberal, though not acts of that species of benevolence and liberality which this court in the construction of a will calls charitable acts.

The question, therefore, resolves itself entirely into that ; for I agree there is no magic in words, and if the real meaning of these words is charity or charitable purposes, according to the technical sense in which those words are used in this court, all the consequences follow ; if, on the other hand, the intention was to describe anything beyond that, then the testator meant to repose in the bishop a discretion, not to apply the property for his own benefit, but that would enable him to apply it to purposes more indefinite than those, to which we must look, considering them purposes creating a trust ; for, if there is as much of indefinite nature in the purposes intended to be expressed, as in the cases to which I first alluded, where the objects are too uncertain to make recommendation amount to trust by analogy, the trust is as ineffectual, — the only difference being, that in the one case no trust is declared, and the recommendation fails, the objects being too indefinite ; in the other the testator has expressly said it is a trust, and the trustee conse-

quently takes, not for his own benefit, but for purposes not sufficiently defined to be controlled and managed by this court. Upon these words much criticism may be used. But the question is, whether, according to the ordinary sense, not the sense of the passages and authors alluded to, treating upon the great and extensive sense of the word "charity," in the Christian religion, this testatrix meant by these words to confine the defendant to such acts of charity or charitable purposes as this court would have enforced by decree, and reference to a master. I do not think that was the intention; and, if not, the intention is too indefinite to create a trust. But it was the intention to create a trust, and the object being too indefinite has failed. The consequence of law is, that the Bishop takes the property upon trust to dispose of it as the law will dispose of it, not for his own benefit or any purpose this court can effectuate. I think, therefore, this decree is right.

*The decree was affirmed.*¹

¹ In the following cases, the intended trust being too indefinite for specific execution, and not being capable of execution as a charitable trust, there was held to be a resulting trust:—

James v. Allen, 3 Mer. 17; Vezey v. Jameson, 1 S. & S. 69; Ommanney v. Butcher, T. & R. 260; Fowler v. Garlike, 1 R. & My. 232; Ellis v. Selby, 7 Sim. 352; 1 M. & Cr. 286, s. c.; Stubbs v. Sargon, 2 Keen, 255; 3 M. & Cr. 507, s. c.; Kendall v. Granger, 5 Beav. 300; Williams v. Kershaw, 5 Cl. & F. 111; Buckley v. Bristow, 10 Jur. n. s. 1095; Yeap Cheah Neo v. Ong Cheng Neo, L. R. 6 P. C. 381; Leavers v. Clayton, 8 Ch. D. 584; Kain v. Gibboney, 101 U. S. 362; Adye v. Smith, 44 Conn. 60; Dashiell v. Att'y-Gen., 6 Har. & J. 1; Chamberlain v. Stearns, 111 Mass. 267; Thomson v. Norris, 5 C. E. Green, 489; Norris v. Thomson, 4 C. E. Green, 307, 575; McAuley v. Wilson, 1 Dev. Eq. 276; Bridges v. Pleasants, 4 Ired. Eq. 26. — ED.

WELFORD v. STOKOE.

IN CHANCERY, BEFORE SIR R. MALINS, V. C., JULY 1, 1867.

[Reported in *Weekly Notes* (1867), 208.]

THIS was a suit for the execution of the trusts of the will of George Simpson, made in 1861, whereby, after making several specific devises, he devised and bequeathed the residue of his real estate to "his trustees and executors thereafter named, the survivor or survivors of them, upon trust to sell and convert into money the whole thereof, and invest the produce in their joint names in the public funds, receive the interest and dividends, and divide the same in the following proportions for an equal benefit," and he appointed T. W. Welford and B. Walker trustees and executors.

Glasse, Q. C., and *C. Hall*, for the plaintiff, T. W. Welford, and

Whitehouse, for B. Walker, contended that the trustees and executors took the beneficial interest in the residuary estate.

Faber, for the next of kin, and

Chitty, for the heir-at-law, contended that there was an intestacy as to the beneficial interest.

THE VICE-CHANCELLOR held that the testator had affixed a trust upon the residuary estate without specifying the objects of the trust, and consequently there was a resulting trust, as to the real estate for the heir, and as to the personalty for the next of kin.¹

¹ In the following cases, property being given upon trust, and no trust being declared, there was a resulting trust:—

Pratt v. Sladden, 14 Ves. 198 (*semble*); *Dunnage v. White*, 1 Jac. & W. 583; *Goodere v. Lloyd*, 3 Sim. 538; *Mayor v. Wood*, 3 Hare, 131; 1 H. L. C. 272, s. c.; *Penfold v. Bouch*, 4 Hare, 271; *Aston v. Wood*, L. R. 6 Eq. 419; *Candy v. Candy*, W. N. (1872) 168. — ED.

VAN DER VOLGEN v. YATES.

IN THE COURT OF APPEALS, NEW YORK, DECEMBER, 1853.

[*Reported in 5 Selden, 219.*]

ON the 27th of April, 1790, Nicholas Van der Volgen owned a lot in Schenectady, the land out of which this controversy arose. On that day, by indenture of release reciting that the releasees were in possession of the premises "by virtue of a bargain and sale to them thereof made for one whole year, by indenture bearing date the day next before the day of the date of these presents, and by force of the statute for transferring uses into possession," and in consideration of £100 paid by the releasees, he released the premises to Robert Alexander and seven other persons named, of whom Joseph C. Yates, the original defendant in this action was one, "and to their heirs and assigns forever." The deed then declared that the conveyance was "upon trust, nevertheless, to the only proper use, benefit, and behoof of Cornelius Van Dyck" and twelve other persons named, "members of St. George's Lodge, in the town of Schenectady, and all others who at present are, or hereafter may become, members of the same, their survivors and successors forever, and to and for no other use, intent, and purpose whatsoever." Then follows a covenant for further assurance to the releasees, their heirs and assigns, "to and for the uses and purposes hereinbefore specified and more particularly mentioned;" and a covenant for the quiet and peaceable possession of the releasees, their heirs and assigns, "for the uses and purposes aforesaid." No conveyance of the premises, subsequent to this, was ever made.

In 1797 Nicholas Van der Volgen died, leaving a will in which, not having specifically disposed of the reversion of the premises in question, he made Lawrence and Petrus Van der Volgen his residuary devisees. In 1819 Petrus died, having devised all his estate by will to Myndert Van der Volgen; Lawrence and Myndert being thus the legal representatives of Nicholas in any devisable estate in the premises which he may have had at the time of his death.

In 1833 the act to incorporate the Utica and Schenectady Railroad Company was passed. Under its authority the company instituted proceedings to appropriate the lot in question to the use of the road. To these proceedings Lawrence and Myndert Van der Volgen, Joseph C. Yates, now the sole survivor of the releasees in the before-mentioned conveyance, and certain persons claiming to be members of St. George's Lodge, were made parties, all of the *cestuis que use* named in that instrument being dead. The commissioners awarded six cents to the two

Van der Volgens, and \$2,755 to Yates "as trustee under the release;" and the two former filed their bill in chancery against the latter to compel the payment of the money to them as the representatives of the releasor, and entitled to the land or its proceeds. The Vice-Chancellor (Gridley) dismissed the bill, and this decree was affirmed by the Chancellor (Walworth). 3 Barb. Ch. 242. The complainants appealed to this court.

All the original parties to the action had died since the commencement of the suit, and their personal representatives were the present parties.

William Tracy, for the appellants.

A. C. Paige, for the respondent.

RUGGLES, C. J. In determining this case, it will be assumed that the deed executed by Nicholas Van der Volgen to Robert Alexander and seven others, for the use of Cornelius Van Dyck and twelve others, was a valid conveyance by lease and release, operating by force of the Statute of Uses, to vest in Van Dyck and others who are specially named as *cestuis que use*, an estate for their joint lives and the life of the survivor, but not an estate in fee: and that the limitation of the further use to "all others who were then or thereafter might become members of St. George's Lodge, their survivors and successors forever," was void for uncertainty; and that the use or equitable interest thus attempted to be given to the members of the lodge not specially named, cannot be sustained either as a legal estate by force of the Statute of Uses, or as an executory trust, or as a charitable use. Upon these assumptions, the only remaining question is whether, upon the death of the last surviving *cestui que use*, the estate resulted back to the representatives of the grantor, who are the complainants. If it did so, they are entitled to the money in controversy; otherwise, not.

Before the Statute of Uses, and while uses were subjects of chancery jurisdiction exclusively, a use could not be raised by deed without a sufficient consideration; a doctrine taken from the maxim of the civil law, *ex nudo pacto non oritur actio*. In consequence of this rule, the Court of Chancery would not compel the execution of a use, unless it had been raised for a good or valuable consideration; for that would be to enforce *donum gratuitum*. 1 Cruise, tit. xi. c. 2, § 22. And where a man made a feoffment to another without any consideration, equity presumed that he meant it to the use of himself; unless he expressly declared it to the use of another, and then nothing was presumed contrary to his own expressions. 2 Bl. Com. 330. If a person had conveyed his lands to another without consideration, or declaration of uses, the grantor became entitled to the use or pernancy of the profits of the lands thus conveyed.

This doctrine was not altered by the Statute of Uses. Therefore it

became an established principle, that where the legal seisin or possession of lands is transferred by any common-law conveyance or assurance, and no use is expressly declared, nor any consideration or evidence of intent to direct the use, such use shall result back to the original owner of the estate; for where there is neither consideration nor declaration of uses, nor any circumstance to show the intention of the parties, it cannot be supposed that the estate was intended to be given away. 1 Cruise, tit. ii. c. 4, § 20.

But if a valuable consideration appears, equity will immediately raise a use correspondent to such consideration. 2 Bl. Com. 330. And if in such case no use is expressly declared, the person to whom the legal estate is conveyed, and from whom the consideration moved, will be entitled to the use. The payment of the consideration leads the use, unless it be expressly declared to some other person. The use results to the original owner where no consideration appears, because it cannot be supposed that the estate was intended to be given away; and by the same rule it will not result where a consideration has been paid, because in such case it cannot be supposed that the parties intended the land should go back to him who had been paid for it.

The Statute of Uses made no change in the equitable principles which previously governed resulting uses. It united the legal and equitable estates, so that after the statute a conveyance of the use was a conveyance of the land; and the land will not result or revert to the original owner except where the use would have done so before the statute was passed. Cruise, tit. x. c. 4, § 20.

It is still now, as it was before the statute, "the intention of the parties to be collected from the face of the deed that gives effect to resulting uses." 1 Sanders on Uses, 104, ed. of 1830.

As a general rule, it is true that where the owner for a pecuniary consideration conveys lands to uses, expressly declaring a part of the use, but making no disposition of the residue, so much of the use as the owner does not dispose of remains in him. Cruise, tit. xi. c. 4, § 21. For example, if an estate be conveyed for valuable consideration to feoffees and their heirs to the use of them for their lives, the remainder of the use will result to the grantor. In such case the intent of the grantor to create a life-estate only and to withhold the residue of the use is apparent on the face of the deed; the words of inheritance in the conveyance being effectual only for the purpose of serving the declared use. The consideration expressed in the conveyance is therefore deemed an equivalent only for the life-estate. The residue of the use remains in or results to the grantor, because there was no grant of it, nor any intention to grant it, and because it has never been paid for.

But the general rule above stated is clearly inapplicable to a case in

which the intention of the grantor, apparent on the face of the deed, is to dispose of the entire use, or, in other words, of his whole estate in the land. Such is the case now before us for determination. The consideration expressed in Van der Volgen's deed was £100; and it is perfectly clear on the face of the conveyance that he intended to part with his whole title and interest in the land. He limited the use by the terms of his deed "to Cornelius Van Dyck and twelve other members of St. George's Lodge in the town of Schenectady, and all others who at present are, or hereafter may become, members of the same, their survivors and successors forever." He attempted to convey the use and beneficial interest to the members of that lodge either as a corporate body, capable of taking by succession forever, or to that association for a charitable use or perpetuity. In either case, if the conveyance had taken effect according to the grantor's intention, it would have passed his whole title, and no part of the use could have resulted to him or his representatives. Admitting that the declaration of the uses was void except as to the *cestuis que use* who were specially named, and good as to them only for life, yet it cannot be doubted that the parties believed when the deed was executed that the grantor conveyed his whole title in fee, and the intention of the parties that the entire use and interest of the grantor should pass, is as clear as if the limitation of the whole use had been valid and effectual. This intent being established, it follows, as a necessary consequence, that the sum of £100 consideration was paid and received as an equivalent for what was intended and supposed to have been conveyed; that is to say, for an estate in fee. The express declaration of the use in the present case, instead of being presumptive evidence that the grantor did not intend to part with the use in fee, is conclusive evidence that he did so intend; and the extent of the express declaration is as much the measure of the consideration as if the whole of the declared use had been valid. The complainant's claim to the resulting use, or reversion of the land, being founded solely on the assumption that the grantor never was paid for it, must therefore fail because the assumption is disproved by the deed itself.

A use never results against the intent of the parties. "Where there is any circumstance to show the intent of the parties to have been that the use should not result, it will remain in the persons to whom the legal estate is limited." 1 Cruise, tit. xi., Use, c. 4, § 41. In this case there are at least two such circumstances. They have already been alluded to; first, the intent expressly declared to convey the land in fee or in perpetuity for the benefit of the members of St. George's Lodge. This effectually repels the idea of a resulting use. The two intents are incompatible. Secondly, the payment of the purchase-money, of which enough has been already said.

If it be said that the express declaration is a presumptive proof that the grantor did not intend that the grantees of the legal estate should have that part of the use which was effectually declared, the answer is, that the express declaration is proof at least equally strong that he did not mean that the use should result to himself. Conceding, then, that the intention of the parties in regard to this residue of the use cannot be carried into effect, the equity which governs resulting uses settles the question between them. It gives the residue to the grantees because the grantor has had the money for it, and the language of the conveyance is sufficient to pass it. The grantor cannot have the purchase-money and the land also. Payment of the purchase-money for the entire title vests the entire use in the grantees, excepting only so much of it as may be effectually declared for the benefit of some other person.

It was insisted on the argument that where an estate is conveyed for particular purposes or on particular trusts only, which by accident or otherwise cannot take effect, a trust will result to the original owner or his heir; and that the present case falls within that principle. We were referred on this point to Cruise, tit. Trust, c. 1, § 56. But on looking at the cases cited by Mr. Cruise, they are found to be cases, not of uses, but of active trusts; all, excepting one created by devise, where of course no pecuniary consideration was paid, and the land therefore was not diverted from the heir-at-law on the failure of the trust. The case in which there was a conveyance in trust has no resemblance to the case now in hand. That the rule above cited from Cruise is inapplicable to the present case appears on Sir Edward Coke's authority, in *The Queen v. Porter*,¹ that upon a feoffment made without consideration to charitable uses void by statute, the feoffee should, notwithstanding the declaration of such uses, be seised to the feoffor and his heirs; but that if the feoffor had reserved but a penny rent, or had taken a penny in consideration of the feoffment, then, although the statute makes void the use expressed, yet the feoffees shall be seised to their own use and not to the use of the feoffor. This was said in the argument for the defendant Porter; and Coke, who was solicitor for the Queen, in a note at the end of the case, referring by a marginal note to this part of the argument, says: "And it is good policy upon every such feoffment (to charitable uses) to reserve a small rent to the feoffor and his heirs, or to express some such consideration of some small sum, for the cause before rehearsed." Thus it appears that upon a feoffment to a void use, upon a pecuniary consideration, however small, the title vests in the feoffee for his own benefit. The conveyance in the present case was by lease and release, which operated in this respect like a

¹ 1 Rep. 24, 26.

feoffment, and vested the estate, legal and equitable, in the releases from and after the expiration of the valid use.

Whether they took this residue of the estate as tenants in common or as joint tenants is a question which does not arise in this case. It has been assumed that the use expressed in favor of the members of St. George's Lodge, not specially named, was not valid as a charitable use. But it was not necessary to decide that question. The decision of this case must not be understood as settling any question as to the title to the money in controversy, except that no part of it belongs to the complainants.

JUDGES MASON, MORSE, JOHNSON, and GARDINER concurred in the foregoing opinion. .

WILLARD and TAGGART, JJ., dissented.

Decree affirmed.

SECTION II.

Where an Expressed Trust fails to exhaust the Entire Property transferred to the Trustee.

ELLCOCK v. MAPP.

IN THE HOUSE OF LORDS, FEBRUARY 25, 28, 1851.

[*Reported in 3 House of Lords Cases*, 492.]

THIS was an appeal against an order of Lord Chancellor Cottenham, which had reversed an order of the Vice-Chancellor of England in a suit instituted for the administration of the estate of a testator, and a declaration of the true construction to be put upon his will.

Samuel Henry Pare, Esq., of Barbadoes, made his will in that island, dated 2d July, 1785, in the following terms: "I give all my estate, both real and personal, in this island or elsewhere, to Edward Elcock, Esq., of, &c., his executors, administrators, and assigns, to and for the several uses, intents, and purposes following; that is to say, out of the rents, issues, and profits, and interest of all debts due to me, to pay unto my dear wife Anna Maria £300 yearly and every year, in addition to her own fortune, which survives to her; and in trust, likewise, to permit and suffer her to have the full enjoyment of the uses and services of all my negro slaves, except Jackey, whom I direct to be freed at the expense of my estate; and in trust, also, to permit and suffer her to use all my household furniture and plate during her natural life; and in trust, also, to receive the interest only of the debt due to me from John Prettejohn, Esq., during the lives of the said John Prettejohn, and of his son and daughter, Charlotte and John; and in trust, likewise, to discharge the said John Prettejohn from the sum of £2,500, which sum I bequeath unto his said two children, and in case of their deaths, to the aforesaid John Prettejohn himself; and in trust, also, to divide the remainder of the interest of debts due to me in the following manner, in equal proportions between H. E. H. Parris, Margaret Elcock, and Anna Maria Elcock, daughters of the aforesaid Edward Elcock; and in case my wife Anna Maria should intermarry and have children, in trust to divide the principal sums among such of her children as shall be living at the death of the aforesaid John Prettejohn, Senior, Charlotte Prettejohn, and John Prettejohn, Junior, and in the mean time to divide one principal sum of £1,500, part of the debt due to me from the estate of the Hon. Samuel

Rous, deceased, among and between the aforesaid H. E. H. Parris, Margaret Ellcock, and Anna Maria Ellcock, on the death of the aforesaid Anna Maria, my said wife. If there should be any doubt of the legality of the above trust for the use of the children of my present wife by a future marriage, I then give such sum or sums as would have been their share or shares unto herself, upon such events as are before mentioned. Lastly, I nominate, constitute, and appoint the aforesaid Edward Ellcock executor of this my last will and testament."

The testator died in England on the 22d October, 1789, leaving all the persons named in his will him surviving. The will was duly proved by Edward Ellcock in Barbadoes, and the executor took possession of all the testator's property there. The debt owing by Mr. Prettejohn was secured on his estate called Constant, and after deducting the sum of £2,500 therefrom, amounted to £4,411 19s. 3d., to which extent the estate remained charged.

H. E. H. Parris died in 1795, intestate. Elizabeth, the wife of the Hon. Samuel Rous (mentioned in the will), was, at the time of the death of the testator, his only next of kin, according to the Statute of Distributions. She survived her husband, but died in 1796, having appointed her daughter her executrix. The daughter died in 1811, having by will appointed as her executrix Eliza Mapp (the present respondent), who proved the daughter's will, and took out letters of administration in England to the estates of both H. E. H. Parris and Elizabeth Rous, of whom she became the sole legal personal representative.

Edward Ellcock died in England in 1798, and appointed his wife his executrix, and by her his will was proved in England. In 1800 she took out letters of administration to his estate in Barbadoes. Mrs. Pare died in 1824, without having been again married, and intestate; and Mrs. Ellcock, who was her sister, took out letters of administration to her. In 1825 Mrs. Ellcock likewise obtained letters of administration, with the will annexed, to the estate of the testator, Samuel Pare. Mrs. Ellcock died in December, 1831, having appointed Margaret Ellcock (the present appellant) her executrix. Margaret Ellcock proved her mother's will in England, and obtained in Barbadoes letters of administration to the estate of the testator, and similar letters in England to the estate of Mrs. Pare; and thus became the representative of Mr. and Mrs. Pare, and of Mr. and Mrs. Ellcock.

Charlotte and John Prettejohn, the son and daughter mentioned in the will, were still alive when the suit was commenced.

Eliza Mapp, in April, 1837, filed her bill in chancery, for the purpose of having the estate of S. H. Pare administered, and the true construction of his will declared.

The case was heard before the Vice-Chancellor of England in March,

1845, when his Honor made a decree, directing that it should be referred to the Master to inquire who was the next of kin of the testator; and on the Master making his report, the cause came on for further directions, when his Honor, on the 26th April, 1847, declared that, according to the true construction of the will of the testator, S. H. Pare, the said Edward Ellcock, the executor, was not a trustee of the residuary personal estate of the testator, but became absolutely entitled to such residuary estate for his own use and benefit.¹

The decree and order were appealed against by Eliza Mapp, and were reversed by the Lord Chancellor, who, by an order dated in April, 1849, declared Edward Ellcock to be a trustee for the next of kin, and directed accounts accordingly.² This was an appeal against that order.

Mr. Bethell and *Mr. Sandys*, for the appellant.

Mr. John Stuart and *Mr. G. L. Russell*, for the respondent.³

August 8. THE LORD CHANCELLOR. In this case the question is, whether an executor is entitled beneficially to the undisposed-of residue of personal estate.

The testator, at the commencement of his will, uses these words: "I give all my estate, both real and personal, in this island and elsewhere, to Edward Ellcock, of, &c. Esquire, his executor, administrators, and assigns, to and for the several uses, intents, and purposes following; that is to say," &c. And then, after specifying various objects of his bounty, he concludes by saying: "Lastly, I nominate, constitute, and appoint the aforesaid Edward Ellcock executor of this my last will and testament."

The late Vice-Chancellor of England decided that Edward Ellcock, the executor, was not a trustee of the residuary personal estate of the said testator, but was absolutely entitled to such residuary personal estate for his own benefit. On appeal that decision was overruled by Lord Cottenham, who held that Edward Ellcock did not become entitled to such residuary personal estate for his own benefit, but was a trustee thereof for the next of kin of the said testator, according to the statute for the distribution of the personal estate of intestates; and it appears to me, that, both upon authority and principle, the decision of Lord Cottenham ought to be affirmed.

Much difference of opinion has existed upon the question involved in this case between judges of the highest eminence, and there are many decisions upon the subject of a residue which is undisposed of; but the only case which closely resembles the present, and which I think it necessary particularly to notice on that account, is the case of *Dawson v. Clark*.⁴ And upon that case Sir William Grant and Lord Eldon entertained very different opinions.

¹ 15 Simons, 568.

² 2 Phillips, 793.

³ The arguments of counsel are omitted. — ED.

⁴ 15 Ves. 415, and 18 Ves. 247.

In that case the residue was claimed by the executors on two grounds : first, as expressly devised to them individually, subject only to the payment of debts and legacies ; and, secondly, if not so devised, then as not being otherwise disposed of, and therefore belonging to them in their character of executors.

Sir William Grant being of opinion that, if the first point should be determined against them, they must succeed on the second ground, did not think it necessary to consider the first ground, but decided that they were entitled on the second ground.¹

Lord Eldon, however, though he decided that the executors were entitled on the first ground, yet so distinctly repudiated the second ground, as is pointed out by Lord Cottenham in his judgment in the present case,² that I regard his observation as equivalent to a decision that in that case the executors were not entitled in their character of executors ; and I agree with Lord Cottenham in considering that there was no real distinction between that case and the present as regards the second ground, on which the executors there claimed. “ This,” as his Lordship remarked, “ is clearly a gift of the whole property in trust, though the trusts declared do not exhaust the whole.”³

In *Pratt v. Sladden*,⁴ Sir William Grant observed, that “ some judges have been disposed to give way to a very slight indication of intention against the executors, and almost to put them upon proof of an intention in their favor. The modern doctrine, however, is, that the executor shall take beneficially, unless there is a strong and violent presumption that he shall not so take ; for Lord Thurlow used too strong an expression when he said it must be ‘ an irresistible inference.’ ”

Lord Hardwicke, also, in the *Bishop of Cloyne v. Young*,⁵ uses the expression “ necessary implication or violent presumption,” but only in a comparative or qualified way. There, after observing that it was “ too loose and general ” a way of stating the principle, to say that “ wherever it probably appears that the testator intended only to give the office of executor, or legal interest only, of the personal estate, not the beneficial, he should barely take a trust,” he added, that “ the rule is rather (which may come to the same thing) that where a necessary implication or violent presumption appears, &c., that the testator, by naming him executor, meant only to give the office of executor, and not the beneficial interest or property, he shall be considered a trustee.”

While Lord Hardwicke and Sir William Grant were opposing the notion that a mere probability, or “ a very slight indication of intention,” that the executor was not to take beneficially was sufficient, I am inclined to think that they have used too strong language in requir-

¹ 15 Ves. 415.

² 2 Phillips, 793.

³ 2 Phillips, 800.

⁴ 14 Ves. 193, 197.

⁵ 2 Ves. Sen. 91, 96.

ing the existence of "a necessary implication or a violent presumption." It seems to me that plain implication or a strong presumption would have been terms more consistent with the decisions and with principle. It is a question of intention; the law, where none is expressed, implying one in favor of the executors. And I think the result of the cases is not inaccurately stated by the late eminent American judge, Mr. Justice Story, who, in his work on Equity Jurisprudence,¹ observes: "In equity, if it can be collected from any circumstance or expression in the will, that the testator intended his executor to have only the office, and not the beneficial interest, such intention will receive effect, and the executor will be deemed a trustee for those on whom the law would have cast the surplus in case of a complete intestacy." And in Toller's Executors,² and in the more recent and extended work, Williams on Executors,³ the law is stated to the same effect as in the words of Mr. Justice Story.

It is true that the *onus probandi* is on the parties opposing the executor in cases not within the Statute 1 Wm. IV. c. 40, just as it is now thrown on the executor in cases within that act. In the former class of cases there must appear to be an intention to exclude the executor from the beneficial interest; in the latter, to confer that interest upon him. But it must not be inferred from this that the position of an executor in the former class of cases is analogous to an heir-at-law of real estate, who takes what is undisposed of. An heir-at-law is the person whom the law, so far as it is uncontrolled by testamentary disposition, designates as the proper object of succession to the inheritance. And the maxim is, *melior est dispositio legis quam hominis*. But the executor takes the legal interest by virtue of an express appointment to the office of executor, and the beneficial interest attaches to the legal interest in him, unless the will affords sufficient evidence of an intention that he is to take in a fiduciary character; in which case the beneficial interest has a separate and independent existence, and instead of attaching in him, stands apart from his legal interest, and rests in the persons whom the testator has designated as the objects of his bounty, and who might be termed testamentary *cestuis que trust*; or, in default of those, then the persons who have a statutory right, grounded on the relationship to the testator, and who may be considered as the statutory *cestuis que trust*.

Lord Eldon, therefore, justly observed, in Dawson v. Clark, that "the proposition that the appointment of executor gives him everything not disposed of, is not correct;"⁴ and he gave a conclusive proof of this by adding, that "if a testator appoints an executor in trust, but does not express his object, he might have relinquished that object,

¹ Section 1208.

² Page 352.

³ Page 1266.

⁴ 18 Ves. 254.

meaning it to go to the executor; yet the will expressing that he intended a trust at that time, the executor would not take in respect of the interest he had by virtue of his office."

It has, indeed, been remarked by a learned text-writer, Mr. Bythewood, in his edition of Jarman, and I think correctly, that the rule which gave the residuary property to the executor generally contravened the intention. And the fact that this is so, and that therefore the legislature has declared it desirable to alter the rule, would almost seem to show that in doubtful cases the leaning ought to have been rather against than in favor of the executor.

This, however, I conceive is not one of such doubtful cases, and I think there is no necessity here to consider upon how low a degree of evidence of intention in their favor the statutory objects of succession may be admitted. Their title seems to me to be clear, inasmuch as the executor is distinctly and unequivocally invested with a fiduciary character as to the whole residue, though the trusts do not exhaust the whole. The circumstance that the trusts do not exhaust the whole has been rightly held to be immaterial. Here that circumstance does not affect the fiduciary character with which the executor has been invested. It only makes him a trustee *pro tanto* for statutory, instead of for testamentary, objects.

Upon principle, then, as well as upon the weight of authority, I am of opinion that the executor in this case is merely a trustee, and I move that the order of Lord Cottenham be affirmed. *Order affirmed.*¹

¹ In accordance with the principal case, there was a resulting trust of the surplus in the following cases: *Cook v. Guavas*, 9 Mod. 187, cited; *Culpepper v. Aston*, 2 Ch. Ca. 115; *Levet v. Needham*, 2 Vern. 138; *Randall v. Bookey*, 2 Vern. 425; *Prec. Ch. 31, s. c.*; *City of London v. Garway*, 2 Vern. 571; *Countess of Bristol v. Hungerford*, 2 Vern. 645 (but see *Rogers v. Rogers*, 3 P. Wms. 193); *Wych v. Packington*, 3 Bro. P. C. (Toml. ed.) 44; *Starkey v. Brooks*, 1 P. Wms. 390; *Kirricke v. Branshey*, 2 Eq. Ab. 508, pl. 5; *Robinson v. Taylor*, 1 Ves. Jr. 44; 2 Bro. C. C. 588, s. c.; *Dean v. Dalton*, 2 Bro. C. C. 634; *Habergham v. Vincent*, 2 Ves. Jr. 204; *Halliday v. Hudson*, 3 Ves. Jr. 210; *White v. Evans*, 4 Ves. 21; *Mordaunt v. Hussey*, 4 Ves. 117; *Seley v. Wood*, 10 Ves. 75; *Nash v. Smith*, 17 Ves. 29; *Langham v. Sanford*, 17 Ves. 442; 19 Ves. 643; *Southouse v. Bate*, 2 V. & B. 396; *Kellett v. Kellett*, 3 Dow, 248; *Girard v. Hanbury*, 3 Mer. 150; *Wollett v. Harris*, 5 Mad. 452; *Rhodes v. Rudge*, 1 Sim. 79; *Braddon v. Farrand*, 4 Russ. 87; *Harris v. Harris*, 2 Keen, 646; *Mullen v. Bowman*, 1 Coll. 197; *Andrew v. Andrew*, 1 Coll. 686; *Love v. Gaze*, 8 Beav. 472; *Meryon v. Collett*, 8 Beav. 386; *Att'y-Gen. v. Malkin*, 2 Phill. 64; *Sanderson's Trust*, 3 K. & J. 497; *Saltmarsh v. Barrett*, 3 De G., F. & J. 279; 29 Beav. 474, s. c.; *Barrs v. Fewkes*, 2 Hem. & M. 60; *Hall v. Waterhouse*, W. N. (1867) 11; *Bird v. Harris*, L. R. 9 Eq. 204; *Selter v. Cavanagh*, 1 Dr. & Walsh, 668; *Neale v. Hagthorpe*, 3 Bland, 551; *Skellinger v. Skellinger*, 3 N. J. L. J. 179.

In *Read v. Stedman*, 26 Beav. 495, there being no next of kin, a surplus of personal property went to the crown.

Where property is settled or devised subject to a trust term of years, and the purposes of the term are either satisfied or void, the trust does not result, but the trustees

CLARKE v. HILTON.

IN CHANCERY, BEFORE SIR JOHN STUART, V. C., JUNE 5, 6, 1866.

[*Reported in Law Reports, 2 Equity, 810.*]

JOHN COOKE, by his will, dated the 28th of January, 1864, so far as is material to the present question, made the following disposition: "I bequeath all my personal estate, to which I shall be entitled at my decease, to my grandson, John Cooke Hilton, his executors, administrators, and assigns, subject to the payment of my debts, personal and testamentary expenses, and legacies, and to the trusts hereinafter contained; upon trust, in the first place, to convert and get in my residuary personal estate, and invest the same as hereinafter directed, with power at the discretion of my said trustee, or the trustees for the time being of this my will, to postpone the conversion: and upon trust to stand possessed of the said trust moneys, upon trust to pay to each of my daughters, Sarah Hilton and Jane Clarke, an annuity of £400, and on the death of my daughter Sarah Hilton, to pay to her children, including the said John Cooke Hilton, the like sum of £400 a year until the youngest child of my said daughter attain twenty-one; and I declare that if any child of Sarah shall die in her lifetime, and any child of such child shall be living at her death, then the annual sum of £400, or the share to which such child would be entitled, if living at the death of my daughter, under the trusts aforesaid, shall be held by my said trustee or the trustee or trustees for the time being of this my will, upon such trusts and subject to such provisions in favor of such child as if its parent had lived till the youngest child attained twenty-one; and upon trust to set apart, immediately after the death of my said daughter Sarah, or when and so soon as her youngest child shall have attained twenty-one, or which of those events that may last happen, £9,000 for the benefit of such of her children as shall be living at her death, and attain twenty-one, in equal shares. And I direct my said trustee, or the trustee or trustees, to pay the same to, and to settle the shares of, the children or grandchildren of my daughter Sarah, by deed, or as my said trustee, or the trustee or trustees for the time being of my will shall in their discretion think proper; and upon further trust immediately after the death of my daughter Jane Clarke, to pay to her children the like sum of £400 a year, until the youngest child of my said daughter Jane shall attain twenty-one; and I declare that the said £400 shall be held hold thereafter for the benefit of those entitled under the settlement or devise. *Best v. Stamford*, 1 Salk. 154; *Davidson v. Foley*, 2 Bro. C. C. 208; *Marshall v. Holloway*, 2 Swan. 432; *Maundrell v. Maundrell*, 10 Ves. 259 (*semble*); *Southampton v. Hertford*, 2 V. & B. 54; *Re Newberry's Trusts*, 5 Ch. D. 746. — ED.

by my said trustee or trustees upon trust, and subject to the provisions in favor of Jane's children, corresponding with the trusts and provisions hereinbefore contained in favor of the children and grandchildren of Sarah Hilton, and upon trust to set apart immediately after the death of Jane, or when her youngest child shall have attained twenty-one, or which of those events may last happen, the like sum of £9,000, for the benefit of Jane's children, upon trust and subject to provisions in favor of Jane's children and grandchildren, corresponding with the trusts in favor of Sarah's children and grandchildren; and upon further trust to invest the sum of £400 and to pay the interest to Elizabeth Pickford for her separate use, and on her death, upon trust to pay and divide the said £400 equally among such of her children as may be then living, and if there should be no such children living at her death, then upon trust for J. C. Hilton, his executors, administrators, and assigns; and upon further trust to pay Mary Ann Deane £25 a year during her life, to commence twelve months after my decease, to be paid half-yearly: if she marry, the annuity to thereupon cease; and as to each of the annuitants, I direct my trustee, or the trustees or trustee for the time being of this my will, to invest a sum sufficient at the time of appropriation to answer by the annual income thereof, the payment of the said annuity, and in the mean time pay the same out of the moneys to arise from my personal estate; such annuity, after appropriation, to be exclusively payable out of the sum appropriated in exoneration of my personal estate, and such sum shall, subject to the payment of the said annuity, form part of the ultimate surplus of my personal estate."

The testator then gave directions as to investments, and gave a house to J. C. Hilton, and directions to retain testator's pew; he devised all estates vested in him as trustee or mortgagee to J. C. Hilton on the same trusts, and appointed John Cooke Hilton, E. Hilton, D. Clarke, and S. A. Clarke to be executors and executrix of his will, and directed that in case any dispute or question should arise between the persons interested under his will, and the trustee or trustees and executors of his will, with regard to the trusts and provisions thereof, the same should be settled by John May.

The testator died in March, 1864, and his will was proved by Edwin Hilton and David Clarke, — the other executors had not yet proved.

A question having arisen as to whether J. C. Hilton took the residue beneficially, this bill was filed.

It was admitted that the act of Lord St. Leonards, 11 Geo. IV. & 1 Wm. IV. c. 40, did not apply to a bequest to one of several executors.

Mr. Bacon, Q. C., and *Mr. Lewin*, for the plaintiff.

Mr. Malins, Q. C., and *Mr. Osborne Morgan*, for the trustees of the

settlement of one of the daughters. *Mapp v. Ellcock*¹ and *Ellcock v. Mapp* have settled the law upon this subject. The circumstance that the trusts declared do not exhaust the estate has been decided to be immaterial. The rule is, that where there is a plain implication on the face of the will that the testator did not intend the executor or trustee to take beneficially, he is to be considered a trustee for the next of kin. In this will the testator declared trusts, and described the proceeds of the real estate as trust moneys.

Again, he directed a conversion to be made, which was unnecessary for the trusts declared, and would have been absurd if he intended to give the whole to J. C. Hilton absolutely.

Then, as to the £400 given to Mrs. Pickford for life, remainder to her children, the testator went on to provide that in default of issue the principal should go to J. C. Hilton. This clearly showed an intention that he was not to take the whole surplus. Again, the testator directs the sum appropriated to answer the annuities to form the ultimate surplus: but why form a surplus, if J. C. Hilton takes the whole after the specified trusts are satisfied? All these considerations show a clear intention that J. C. Hilton should not take beneficially. *Barrs v. Fewkes*.² The mere fact that he took a specific interest under the will negatives the intention to give him the whole surplus after exhausting the trusts. *Saltmarsh v. Barrett*; ³ *Love v. Gaze*.⁴

Mr. Renshawe appeared for David Clarke, one of the executors, but took no part in the argument.

Mr. Greene, Q. C., and *Mr. Little*, for J. C. Hilton. The question is one of intention, whether on the whole of the will the court can find an intention to make an immediate provision for J. C. Hilton. The mere circumstance that the testator used the words "on trust" can make no difference, because it is quite clear there is a partial trust which does not embrace the whole gift. The word "charge" might be held on the whole scope of a will to create a trust, as in *Saltmarsh v. Barrett*,³ just as the word "trust" in *Dawson v. Clarke*,⁵ coupled with the word "charged," was held not inconsistent with a beneficial interest. The real question is always, What is the testator's intention? Again, in *Hughes v. Evans*,⁶ the word "trust" occurred more than once; but it was held, on the view of the whole will, that a beneficial gift was intended.

Applying that principle here, it is clear that J. C. Hilton was intended to take beneficially. The tenor of the will was, to make an immediate provision for J. C. Hilton, which could only have effect by holding that he took the residue.

Mr. Bacon, in reply.

¹ 2 Ph. 793.

² 2 H. & M. 60.

³ 29 Beav. 474. Affirmed on appeal, 3 D., F. & J. 279.

⁴ 8 Beav. 472.

⁵ 18 Ves. 247.

⁶ 13 Sim. 496.

SIR JOHN STUART, V. C. This case belongs to a class as to which the most learned judges have differed in opinion. In *Dawson v. Clarke*,¹ Lord Eldon and Sir William Grant held opposite views, and each maintained his own opinion, after knowledge of the other.²

In *King v. Denison*,³ argued by Sir S. Romilly on the one side, and Mr. Leach on the other, Lord Eldon pointed out the distinction between gifts by will upon trusts and gifts by will subject to trusts. "If," said Lord Eldon (page 272), "I give to A. and his heirs all my real estate, charged with my debts, that is a devise to him for a particular purpose, but not for that purpose only. If the devise is upon trust to pay my debts, that is a devise for a particular purpose, and nothing more, and the effect of those two modes admits just this difference: the former is a devise of an estate of inheritance for the purpose of giving the devisee the beneficial interest, subject to a particular purpose; the latter is a devise for a particular purpose, with no intention to give him any beneficial interest."

Here the testator, in the plainest language, has given to J. C. Hilton all his personal estate, subject to debts and legacies, and to the trusts thereafter mentioned. And afterwards; in referring to these trusts, he uses the words "upon trust" as a matter of course. But if the property is given to J. C. Hilton subject to trusts specified, it cannot be held subject to any other trusts; and if after satisfying the trusts specified there remain a surplus, there is nothing in the language of the gift or in the context to create a resulting trust in favor of the next of kin.

In *Mapp v. Ellcock*,⁴ the trust covered the whole property, and the trustee took nothing but a mere trust estate.

But even if the words were a gift to A. B. of all the testator's estate on trust, the context might still show that the trustee was intended to take some beneficial interest. That occurred in *Dawson v. Clarke*.¹ Sir W. Grant noticed the case of *Coningham v. Mellish*,⁵ as showing how far the court has gone in holding a trustee was to take beneficially. That case was mentioned with approbation by Lord Hardwicke in *Hill v. The Bishop of London*.

In *Hobart v. Suffolk*, lands were devised to three persons and their heirs, to the use of them and their heirs upon the trusts thereafter mentioned. The testator then directed them to convey part of the land to A. for life, and part to B. in tail, but gave no direction as to the residue of the fee; and the court held there that there was a resulting

¹ 15 Ves. 409; on app. 18 Ves. 247.

² For approval of Lord Eldon's opinion, see *Ellcock v. Mapp*, *supra*, and *Read v. Stedman*, 26 Beav. 495, 503. — Ed.

³ 1 V. & B. 260.

⁴ 2 Ph. 793.

⁵ Pr. Ch. 31.

trust for the heir, — the gift being to three trustees, of whom two only were related to the testator.

The principle of all these cases is plain. Where property is given to a man subject to certain defined trusts, there remains no right in any one but the donee when those trusts are exhausted. Where, however, an estate is given to a man in the character of a trustee, without anything to indicate that a beneficial interest is intended, then there is a resulting trust.

In the present case the greatest difficulty occurs in the use of the expression that the donee is to stand possessed of the said trust-moneys on trust. If all the moneys were trust-moneys according to the strict meaning of the word, no part of them would be free from the trust. But the whole will must be taken together, and the words of gift give the whole property subject to the trusts, and not upon the trusts. When the trusts are satisfied and the trust exhausted, the rest of the property remains vested in the legatee or devisee discharged of any trust. But it is a different thing to hold that these words attach a trust to the surplus after the trusts described have been satisfied. There must be a declaration that John Cooke Hilton is absolutely entitled to the property comprised in the testator's will, subject to the trusts therein contained. The costs must come out of the estate.¹

¹ In the following cases it was held that the trustee took for his own benefit the surplus that remained after satisfying the trusts expressly declared: *North v. Crompton*, 1 Ch. Ca. 196 (but see *Starkey v. Brooks*, 1 P. Wms. 390); *Cunningham v. Mellish*, 2 Vern. 247; *Prec. Ch.* 31, s. c.; *Docksey v. Docksey*, 5 Bro. P. C. (Toml. ed.) 39; 2 Eq. Ab. 506, s. c.; *Rogers v. Rogers*, 3 P. Wms. 193; *C. t. Talbot*, 268, s. c.; *Mallabar v. Mallabar*, *C. t. Talbot*, 78; *Hill v. Bishop*, 1 Atk. 618; *Batteley v. Windle*, 2 Bro. C. C. 31; *Pratt v. Sladden*, 14 Ves. 193; *Walton v. Walton*, 14 Ves. 318; *Dawson v. Clark*, 15 Ves. 409; 18 Ves. 287; *King v. Denison*, 1 V. & B. 260; *Cook v. Hutchinson*, 1 Keen, 42; *Wood v. Cox*, 2 M. & Cr. 684; *Hughes v. Evans*, 13 Sim. 496; *Russell v. Clowes*, 2 Coll. 648 (but see *Read v. Stedman*, 26 Beav. 495); *Re Cooper's Trusts*, 4 D., M. & G. 757; *Williams v. Roberts*, 27 L. J. Ch. 177; 4 Jur. n. s. 18, s. c.; *Tucker v. Kayess*, 4 K. & J. 339; *Irvine v. Sullivan*, L. R. 8 Eq. 673; *Williams v. Arkle*, L. R. 7 H. L. 606; *Downer v. Church*, 44 N. Y. 647.

See, as illustrating the same principle, *Hammond v. Neame*, 1 Sw. 35; *Hamley v. Gilbert*, Jac. 354; *Hadow v. Hadow*, 9 Sim. 438; *Browne v. Paull*, 1 Sim. n. s. 92; *Longmore v. Elcum*, 2 Y. & C. C. C. 363; *Cape v. Cape*, 2 Y. & C. 543. *Conf. Wetherell v. Wilson*, 1 Keen, 80.

If property is given to one person subject to a charge or trust in favor of another person, and for any reason the trust cannot take effect, there is no resulting trust, but the trust sinks for the benefit of the intended trustee; *e. g.*, where property is given subject to a trust and no trust is declared (*Heptinstall v. Gott*, 2 John. & H. 400), or subject to a trust to be declared and no trust is afterwards declared (*Fenton v. Hankins*, 9 W. R. 300), or subject to a trust which is void for illegality or uncertainty (*Jackson v. Hurlock*, 2 Eden, 263; *Amb.* 487, s. c.; *Wright v. Row*, 1 Bro. C. C. 61), or subject to a trust that fails by lapse (*Sutcliffe v. Cole*, 3 Drew. 135; *Noel v. Henley*, 7 Price, 241; *Dan.* 211, 322). — ED.

In re VAN HAGAN.SPERLING *v.* ROCHFORD.

IN THE HIGH COURT OF JUSTICE, CHANCERY DIVISION, BEFORE SIR RICHARD MALINS, V. C., AUGUST 6, 1880.

[*Reported in Weekly Notes* (1880), 159.]

IN THE COURT OF APPEAL, NOVEMBER, 1880.

[*Reported in Weekly Notes* (1880), 164.]

HENRY VAN HAGAN, by his will, dated in 1826, gave to his mother a general power of appointment over certain real estate, provided always that should his mother die without any will, then he gave the said real estate to Edward Clarke, subject to the payment of certain legacies. The mother of the testator many years afterwards made her will containing a direction to this effect, — “and as to and concerning all the real estate whatsoever and wheresoever, of or to which I or any person or persons in trust for me am, is, or are seised or in any way entitled, or over which I have (either under or by virtue of the will of my deceased son), or over which I shall have any power to dispose, I give, limit, direct, and appoint the same unto and to the use of J. Sperling, F. Wollaston, and G. Sperling, their heirs and assigns, in trust for George R. Green, his heirs and assigns, for ever.” George R. Green died in the lifetime of the testatrix, and a question was now raised whether the property went as in default of appointment, under the will of Henry Van Hagan, or whether it went as part of the real estate of the testatrix.

Joshua Williams, Q. C., and *E. S. Ford*, for the heir of the testatrix.

J. Pearson, Q. C., and *Rodwell*, Q. C., for the devisee of Henry Van Hagan.

THE VICE-CHANCELLOR having reserved his judgment, decided that this being real estate, the mere circumstance of the testatrix making an appointment which failed did not show an intention to make the real estate part of her general estate. The only object of the testatrix was to give the property to G. R. Green, and he having died in her lifetime, the result was that the appointment had wholly failed, and the property went in default of appointment, under the will of Henry Van Hagan, to the estate of Edward Clarke.

THIS was an appeal by the trustees of the will of the testatrix from a decision of Vice-Chancellor Malins.

Joshua Williams, Q. C., and *E. S. Ford*, for the appellants.

J. Pearson, Q. C., and *Rodwell*, Q. C., for the respondents.

The court (JESSEL, M. R., JAMES and COTTON, L.JJ.) reversed the order appealed from, and decided that the trustees of the will of the testatrix were entitled to the appointed property, subject to a resulting trust in favor of the heir-at-law of the testatrix, if any. (*a*)

(*a*) *Chamberlain v. Hutchinson*, 22 Beav. 444 ; *Brickenden v. Williams*, L. R. 7 Eq. 310, *accord*.

Conf. Mansell v. Price, Sugd. Powers (8th ed.), 943 ; *Lefevre v. Freeland*, 24 Beav. 403. — ED.

SECTION III.

Where the Legal Title is transferred and a Trust declared as to a Part of the Property, but no Intention expressed as to the Rest.

ANONYMOUS.

IN THE EXCHEQUER CHAMBER, TRINITY TERM, 1452.

[Reported in Fitzherbert's Abridgment, Devise, placitum 22.]

Ulling rehearsed how a citizen of London, by his estate enrolled in the hustings of London, had devised certain tenements in the said city to his son and three others in fee, and his will was by the same testament that one of the three should have all the profits of the said land during his life; and now, since he who was to have the profits is dead, the heir, who was another of the feoffees, exhibited a bill in chancery concerning this matter, and that the said devise was upon confidence, and prayed that the others should release to him.

Wang. Since by his will he devised the said land to all four in fee, and by the same devise he made his will that one of them should have all the profits for his life, it seems clear that, after the death of him who was to have the profits, the others should have the fee, and not release to the heir; for it is not like a feoffment in which no will is expressed, but since his will is expressed it shall be intended all his will, in which case they shall hold to their own use.

FORTESCUE, C. J. I see no diversity between a feoffment and a devise as to this intent; wherefore, if you will not deny that it was upon confidence, it is right that you should release to the heir, which the other judges conceded.

CASTLE v. DOD.

IN THE COMMON PLEAS, MICHAELMAS TERM, 1608.

[Reported in Croke's James, 200.]

UPON a special verdict the case was that A., tenant for life, granted by feoffment his estate to B., and by indenture limited the use to B. for the life of A. and B.; and if he died, living A., that it should remain to C. Afterward, B. died, living A. C. entered, and let to D. for years, and died, living A.

Whether the lessee should retain this as an occupant, living A., or

that A. should have it again (because no other use is limited after the death of C., by reason of his ancient use), was the question.

It was adjudged, after argument, that C. should have it as an occupant, and his lessee should hold it as an occupant, and that A. had not any residue of the use in him; for although, where tenant in fee makes a deed of feoffment, and limits the use for life or in tail, and doth not speak of the residue, it shall be to the feoffor, or conusor, because he had the ancient use in him in fee; yet, when tenant for life, or he who hath particular estate, grants his estate by fine, and limits the use for years, or for a particular time, it shall not return to him, but be to the conusee, although the fine were without any consideration; because he who hath the particular estate by fine is subject to the ancient rent and forfeiture, which is a sufficient consideration to convey the estate to him.¹ And although it was objected that, at the common law, there was not any occupant of a use, and this statute hath vested the possession in such manner and nature as the use was, *ergo*, there shall not be an occupant of a possession vested to a use.

COKE, C. J., said: This statute is intended that the land shall have the same qualities as the use had, viz. if the use was a conditional estate in the land, it shall be conditional, but it shall not have the collateral qualities as the use hath; for there shall be a tenancy by the curtesy of such an estate vested, and it shall be assets: and by the same reason there may be an occupancy; for the use and land are now incorporated and of one nature. And therefore it was resolved in Baker's Case, although the use may be waived without matter of record, yet the estate vested to a use cannot at this day be waived.

¹ "But if the use be declared to the grantor for an estate for life or years, the reversion, though not expressly disposed of, does not result to him, but vests in the grantee; for by the opposite construction the particular estate would merge in the reversion, and the grantor would resume the entire fee, against the express terms of the declaration of uses, which restricts his interest to the particular estate. If, however, the use be declared to the grantor for an estate tail, he may also take the reversion by resulting use; for an estate tail and the reversion in fee may subsist together in the same person. (a)

"If the feoffment or conveyance of the legal possession be made for a particular estate only, as a gift in tail, or a lease for life or for years, the tenure alone thereby created, with its attendant services and obligations, supplied a consideration sufficient to prevent the use from resulting, and to carry it to the donee or lessee; and this doctrine applies at the present day. But an express use declared in favor of another would rebut the use implied from the tenure in such cases. (b) The statute *Quia emptiores* prevented the creation of any tenure which might carry the use upon a conveyance of the fee-simple." (c) Leake, Digest of the Law of Property in Land, 107-108. — Ed.

(a) Bacon on Uses (Rowe's ed.), notes, p. 223; 1 Sanders on Uses, 103. See Adams v. Savage, 2 Salk. 679; Ld. Raym. 854.

(b) Perkins, §§ 534-537; 2 Leon. 16, Brent's Case; Dyer, 312 a.

(c) Perkins, §§ 528, 529.

HOBART BAR. v. COMITISS. SUFFOLK, MAYNARD, COLCHESTER, AND OTHERS.

IN CHANCERY, BEFORE SIR SIMON HARCOURT, K., HILARY TERM, 1709.

[Reported in 2 Vernon, 644.]

SERJEANT MAYNARD, by will, devised to the Countess of Suffolk, the Lord Gorge, and the defendant Colchester and their heirs, to the use of them and their heirs, all his several manors and lands, upon the trusts after mentioned; and then directs that, after the death of the Countess, his wife, they should convey part of the estate to Hobart for ninety-nine years, if he so long lived; remainder to his wife as to part for life, remainder to the first son for life; and other part of his estate in like manner to his granddaughter, the Countess of Suffolk, and her issue male for life, with a cross-remainder, on failure of issue male of either of them, — the will saying nothing more as to the remainder in fee.

A question was now made by Mr. Colchester, and insisted upon, that, on failure of issue male, both of Hobart and Stamford, the remainder of the estate was to go to the trustees, and could not be a resulting trust for the heir, — the devise being to them and their heirs, upon the trusts after mentioned, which imports only that they should be trustees for the purposes after mentioned, and, when those estates were spent, it was to remain with them and their heirs, to the use of them and their heirs, which excludes any trust for the heir-at-law.

THE LORD CHANCELLOR. This is not fully within the reason of the case. Where a devise or grant is in trust for payment of debts, there the whole estate is affected with the trust, but here the remainder is not affected with any trust declared; but, considering the devise to three persons, and the Lord Gorge no relation to the testator, it could not be intended a provision or bounty, as it might have been, if the devise had been to Colchester alone, and decreed the remainder in fee to the testator's right heir.¹

¹ Sherrard v. Harborough, Amb. 165; Hopkins v. Hopkins, Talbot, 44; Moore v. Magrath, Cowp. 9; Northern v. Carnegie, 4 Drew. 587; Pollard's Trusts, 32 L. J. Ch. 657; Travers v. Travers, L. R. 14 Eq. 275; Easterbrooks v. Tillinghast, 5 Gray, 17, *accord*.

“Here is to be observed the intendment of law, that when a feoffment is made to a future use, as to the performance of his last will, the feoffees shall be seised to the use of the feoffor and of his heires in the meane time. (a) *Ipsæ etenim leges cupiunt ut jure regantur*. And reason would that seeing the feoffment is made without consideration, and the feoffor hath not disposed of the profits in the meane time, that by construction and intendment of law the feoffor ought to occupie the same in the meane time. And so it is when the feoffor disposeth the profits for a particular time *in presenti*, the use of the inheritance shall be to the feoffor and his heires, as a thing not disposed of.” Co. Lit. 271 a. — ED.

(a) Woodliff v. Drury, Cro. El. 439; Clere's Case, 6 Rep. 18; Cro. El. 877; Cro. Jac. 31, s. c. — ED.

SECTION IV.

Where the Conveyance to the Trustee is without Consideration.

NOTE.

TRINITY TERM, 1535.

[*Reported in Benloe, 16, placitum 20.*]

NOTE by all the justices and sergeants in the common bench, that, if a man enfeoffs another in fee of land by deed, without any consideration in the premises of the deed or *dehors*, but the *habendum* is to the feoffee *ad usum suum proprium*, as is recited in the deed, and still the feoffee suffers the feoffor to take the profits of the land for divers years afterwards, nevertheless the feoffee shall be adjudged to have the right to the said land in fee, and not the feoffor, for the use was limited to him by the deed, which was a good consideration. *Vide 7 Eliz. Pl. Com. f. 308.*¹

DOWMAN'S CASE.

IN THE COMMON PLEAS, EASTER TERM, 1586.

[*Reported in 9 Reports, 7 b.*]

THOMAS DOWMAN, Esq., and Eliz. his wife, brought an assize of novel disseisin before John Clench and Francis Rodes, justices of assize in the county of York, against Ed. Vavasor, George Vavasor, and others, and complained they were disseised of their freehold in Spaldington, Willytost, and Southcave, in the same county, &c., and made their plaint of six houses, three hundred acres of land, one hundred acres of meadow, and two hundred acres of pasture; and all but the said Edward Vavasor pleaded *nul tort nul disseisin*, and the said Edward pleaded that one Peter Vavasor, Esq., was seised of the tenements aforesaid put in view, and now in plaint in fee, against whom Andrew Windsor, Esq., William Vavasor, and others, 2 Jan. *anno regni dominæ El. 15*, brought a writ of entry in the post of the tenements aforesaid, against the said Peter Vavasor, returnable Octab. Hil., at which day a common recovery was had against him with single voucher, and executed by *habere facias seisinam* 4 Feb., &c. *quæ quidem recuperatio in forma præd' habebat'*, and was to the use of the said Peter

¹ *Stapley v. Lark*, Goulds. 82, pl. 23; *Yelverton v. Yelverton*, Noy, 19, per Popham, C. J., *accord.* — ED.

for his life, without impeachment of waste, and afterwards to the use of his eldest son in tail, and so to the ninth son in seniority in tail, and for want of such issue, to the use of the said E. Vavasor, brother of the said Peter, for his life, without impeachment of waste, and afterwards to the use of his eldest son, and to the heirs males of his body, and so to the ninth son in their seniority of the like estate; and for want of such issue, to the use of the said G. Vavasor, Ra. Vavasor, Mar. Vavasor, Rob. Vavasor, Tho. Vavasor, and Rich. Vavasor, brothers of the said Peter, to every of them the like estate, with like remainders to their ninth issue male, in their seniority in tail; and afterwards to the use of the heirs males of Peter Vavasor, Knight, lawfully begotten; and afterwards to the use of the right heirs of the said Rich. Vavasor, and alleged the execution of the uses by force of the statute of 27 H. VIII., and the death of the said Peter Vavasor without issue, after whose death he entered as in his remainder, and gave color to the plaintiffs. To which the plaintiff replied and confessed the recovery, as the said E. had alleged, but farther said, that the said recovery was to the use of the said Peter and his heirs, and that, after the death of Peter, the tenements descended to the said Eliz., wife of the said Tho. Dowman, as sister and heir of the said Peter, &c., *absque hoc quod recuperatio prædicta tenementorum præd', etc., in forma prædicta habita, fuit ad usus in barra prædict' Edwardi superius specificat', prout, etc.* And thereupon issue was joined, and it was found by the recognitors of the assize that the said Peter, being seised in fee, suffered the said recovery of the tenements aforesaid, as the said Edward had alleged; and farther, the recognitors of the assize said, *quod quædam indentura facta fuit inter præfat' Petrum Vavasor et præd' Andream Winsor* and others, the recoverors, of the other part, *cujus tenor sequitur in hæc verba*; which indenture bears date *primo die Februarii anno 15 El. reginæ*, and witnesseth, "that it is covenanted, concluded, condescended, declared, and fully agreed between the said parties, and either of the said parties, for himself and his and their heirs, doth conclude, condescend, declare, and agree by these presents to and with the other, that is to say, whereas the said Andrew, &c., have this present term of St. Hilary recovered to them and their heirs by writ of *Entrie sur disseisin in le post*, against the said Peter Vavasor, according to the usual order and form of common recoveries heretofore used, the manor of Spaldington, &c., that the intent and true meaning of all the said parties now is, and at the time of the said recovery had and suffered was, that the said recoverors and their heirs immediately from and after the recovery so had and executed should and shall stand and be seised of the said manor, &c., to the only uses and intents hereafter by these presents set forth and declared, and to no other uses, intents, and purposes, that is to say," and declares and expresses the same uses mentioned

and alleged in the bar of the said E. Vavasor, without any variance. And farther, the said recognitors of assize found that the tenements now put in view were, &c., parcel of the said manor of Spaldington, *sed utrum indentura præd' post recuperationem præd' per præfat' Petrum Vavasor Armig' in forma præd' fact, et habit' ger' dat' præd' primo die Februarii ac prim' deliberat' 15 die Februarii anno 15 supradict' post recuperationem præd' existen' ad usus in eadem specific' sit bona et sufficiens in lege ad ducendos et declarandos usus præd' recuperationis præd' tenementorum in visu recognitorum posit', et in quærela præd' specific' necne iidem recognitores penitus ignorant, et inde petunt advisamentum justic' et cur' hic, et si videbitur curiæ*, that the said indenture is good and sufficient, &c., then they found that the said recovery of the tenements aforesaid was to the same uses in the bar of the said E. Vavasor, as the said E. had alleged; and that the other defendants had done no wrong nor disseisin; and if the said indenture is not good and sufficient, &c., then they found against all the defendants. And for difficulty the said justices of assize did adjourn the parties and the record before the justices of the Common Pleas, *de audiendo et recipiendo quod iisdem justiciar' dominæ Reginæ de præd' Banco adtunc et ibid' considerand' videbitur in hac parte*. And in this case two questions were moved and argued by the sergeants, at the bar. 1. If the said indenture made after the said recovery was sufficient in law to direct and declare the uses of the said precedent recovery.¹ And after the case had been often argued by the sergeants at the bar, the case was argued by the justices at the bench.

And it was unanimously resolved by all the justices of the bench, that the said indenture subsequent was sufficient to direct and declare the uses of the precedent recovery against the said Peter Vavasor and his heirs, for so it is concluded and declared by the deed indented, that the intent and true meaning of all the parties now is, “and at the time of the said recovery was, that the said recoverors, &c., should stand seised, &c., to the only uses and intents by these presents set forth and declared, and to no other use, intent, or purpose.” Against which express affirmation and declaration by deed indented, the said Peter or his heirs shall never be admitted or received to say that no such uses were declared at the time of the said recovery, but that the said recovery, notwithstanding the subsequent declaration shall be construed and adjudged by force of a use implied by operation of law, to be to the use of the said Peter and his heirs: but this declaration by the said deed indented has this operation in law against the said Peter and his heirs, that there was a present, certain, and complete agreement and declaration of the said uses at the time of the said recovery, for so the indenture expressly purports; and therefore all that has been objected,

¹ Only the facts of the case and the opinion of the court upon this point are given.

that the declaration ought to be precedent, or present and certain and complete, and not as a communication with reference to matter to be put in writing afterwards, was well agreed; but now this deed indented in judgment of law doth import and witness against the said Peter Vavasor and his heirs, forasmuch as nothing appears to the contrary, that there was a certain and complete declaration of uses at the time of the said recovery, and this stands upon pregnant and apparent reason; for inasmuch as Peter and his heirs are only to take advantage for want of declaration of uses, reason requires that this declaration of the said Peter by his deed indented should stand against him and his heirs; and this case is not like the said cases in 39 Ass. and 46 E. III., cited before; for in such case, if the lands were held before in socage, the tenant could not create or grant knight's service, which was not due before; and in the record the infant was not made heir to J. But here, without question, Peter Vavasor, the tenant of the land, might, at the time of the recovery, limit what uses he would, and Eliz. is heir to Peter; and the reasons of the book in 35 H. VI. are, 1. The heir in such case was not bound, because the words of the charter were but by way of recital. 2. That the words of the deed indented were all the words of the lord, and not of the tenant, the heir of whom should be bound, and that the brother of the half-blood was not heir to the tenant, who was party to the deed. But in our case, 1. It is not by way of recital, but an express affirmation and declaration. 2. It is the acknowledgment and declaration of the tenant of the land itself, and the said Elizabeth, one of the plaintiffs, is heir to Peter Vavasor. *Vide* 10 E. III., 22, 24, Rob. de Vale's Case. And as to the objection which was made, that the said privilege to be without impeachment of waste, cannot be without deed, &c. To that it was answered and resolved, that, if it was admitted that a deed in such case should be requisite, yet without question all the estates limited would be good; although it is admitted that the clause concerning the said privilege would be void. And, therefore, if a man enfeoffs one by parol to the use of A. for life, without impeachment of waste, with divers remainders over, admitting that the clause of "without impeachment of waste" in such case should be void, yet the estate for life, with the remainders over, is well executed. And a difference was taken between indentures precedent, which shall direct the uses of a subsequent recovery, and indentures subsequent; for when precedent indentures are made, and afterwards a recovery follows accordingly,¹ there no averment can be taken by parol

¹ Countess of Rutland v. Earl of Rutland, Cro. Jac. 29. [1604. "Upon evidence to a jury, it was held by all the court, and so delivered for law to the jury, that, if there be an indenture for the levying a fine to such persons, before such a time, to such uses, and the fine be levied to the same persons within the same time, it shall be to the same uses; and no averment can be to the contrary, unless it be by other matter in writing.

that the recovery was to other uses than are declared in the indenture ; for nothing vests in any till the recovery is had, and in such case a declaration by parol will not control the declaration by deed ; but against an indenture subsequent, declaring the uses of a recovery precedent, there, averment may be taken that other uses than in such indenture are declared were expressed and limited before and at the time of the recovery, because, by such limitation, the use and estate was vested according to such limitation, which cannot be divested by any declaration by indenture subsequent. It was also resolved (as appears before) that the said declaration subsequent by deed indented should stand good against the said Peter Vavasor and his heirs, forasmuch as appeareth there was no other declaration of any other use ; but if, after the recovery had, Peter Vavasor had sold or given or charged the lands to others, which would be defeated and annulled by the declaration subsequent, there such subsequent declaration of itself should not subvert the mean estates, charges, or interests, unless it could otherwise be proved that, by the certain and complete agreement of the parties, the recovery was had to such uses ; for by judgment of law such declaration subsequent shall be sufficient when no other certain and complete declaration or limitation of any other use, either at the time or before the recovery be made, or any estate or interest mesne be vested : and as when a common recovery is suffered without consideration, it is in judgment of law without any proof to the use of him who suffers the recovery, if nothing is proved to the contrary ; so when such subsequent declaration (as in the case at bar) is made, it shall be sufficient of itself, without any other proof of the declaration of the same uses, either before or at the time of the recovery, if no other limitation of the use was made, nor any mesne estate or interest of any other thereby defeated. And because the intention of the parties is the direction of uses, in the argument of this case many cases were put where an act subsequent shall declare the intention of a general act precedent ; as if tenant in tail has issue two daughters and dies, and the elder enters into the whole, and afterwards makes a feoffment thereof with warranty, this is a lineal warranty for one moiety and a collateral warranty for the other, for the feoffment subsequent shall declare the intention of the general entry, that it was only for herself, or otherwise it would be a warranty which commenced by disseisin for one moiety, and therewith agreeth Lit. cap. Gar. f. 160. So if the lord comes upon the tenancy, and takes and drives away an ox, if he

“ But if a fine be levied to other persons, or at another time after, it may well be averred by parol to be to other uses. For in the first case the indenture is directory to the fine, and in the other case it is but evidence.” 5 Rep. 25 b, s. c. *Tregany v. Fletcher*, 1 Ld. Ray. 155 ; *Salk.* 676, s. c. ; *Jones v. Morley*, 1 Ld. Ray. 289, 290 : *Comb.* 429 s. o. ; *Stapilton v. Stapilton*, 1 Atk. 7. — Ed.

impounds it, the taking shall be adjudged for a distress; but if he kills the ox, this act subsequent shall declare his intention *ab initio*, and shall make him a trespasser, and therewith agree 12 Ed. IV. 8, b, 28 H. VI. 5, &c. And as to the fourth reason or objection which was made, that it was but matter of evidence tending to prove to what uses the recovery was had, that has been answered before, that in judgment of law it is sufficient to declare the use when nothing appears to the contrary, as in the case of indentures precedent, or when a recovery is suffered without any consideration, and without limitation of any use; but as to the point of pleading, it was resolved that, as well in the case at bar as in the case of an indenture precedent, and recovery suffered without consideration, the usual form of pleading ought not to be altered, *sc.* to aver that the recovery was suffered to such uses, and upon the evidence the court ought to direct the jury according to law, or that they should find the truth of the case, as in the case at bar they do. And the justices in this case cited a former resolution in the point in the Court of Wards, between the same parties (Hil. 21 El.), the whole special matter as before being found by office, and transcribed into the same court, where, by Sir Christ. Wray and Sir James Dyer, assistants to the said court, and by the advice, also, of other justices, it was resolved that the said indentures subsequent were sufficient to declare the uses of the recovery precedent, because nothing appeared to the contrary. And as to the fifth and last reason or objection which was made, it was answered and resolved that no mischief or inconveniency could ensue upon this construction, as was pretended at the bar, but great inconveniency would ensue on the other side, for the inheritances of many subjects in England depend upon such declarations subsequent, or at least upon indentures which, in truth, were delivered after the recoveries suffered or fines levied. And these resolutions stand with the common opinion of men learned in the law and common experience; and the alteration of such opinions which concern assurances of inheritances would be too dangerous.

SHORTBRIDGE v. LAMPLUGH.

IN THE QUEEN'S BENCH, MICHAELMAS TERM, 1702.

[Reported in 2 Lord Raymond, 798.¹]

ERROR upon a judgment given in C. B. in an action of covenant brought by Thomas Lamplugh against Elizabeth Shiers. The plaintiff declared that Thomas Ashby being seised in fee of a piece of ground in Westminster, the eleventh of May (3 W. & M.), by indenture

¹ 2 Salk. 678; 3 Salk. 386; Farr. 71; 7 Mod. 71, s. c. — ED.

then bearing date demised it to John Griffith for sixty-one years, rendering a pepper-corn rent for the first year, and £100 per annum for the sixty years ensuing; in which indenture Griffith covenanted for himself, his heirs and assigns, to pay the said rent, and to maintain the houses agreed to be built upon the said ground in good repair; that Thomas Ashby, by indenture dated the twenty-eighth day of September (3 W. & M.), in consideration of 5s., bargained and sold the premises to Sir Philip Meadows and others for one year; and that the said Thomas Ashby, by indenture dated the twenty-ninth of September following, released and confirmed the said premises to the said Sir Philip Meadows and the others in fee; by virtue of which indentures of bargain and sale and release, and by virtue of the statute of 27 H. VIII. c. 10, for transferring uses into possession, they were seised of the reversion in fee; then he shows a lease and release from Sir Philip Meadows and the other grantees to Lamplugh in the same manner as he had pleaded the former lease and release; then he shows that the interest of Griffin came by assignment the twenty-first of May (4 W. & M.), to Elizabeth Shiers; and then he assigns a breach in non-payment of rent due for five years and a half, and in default of repairs. The defendant demurred to this declaration, and showed for cause that the declaration *est duplex et caret forma*. And after argument, judgment was pronounced in C. B. for the plaintiff, and a writ of inquiry was awarded, and damages given £760, and then final judgment was entered for the plaintiff. Upon which Elizabeth Shiers, the defendant, brought a writ of error; and pending it, she died. And Shortridge, as executor to Elizabeth Shiers, brought a writ of error *coram vobis residet*, and assigned the general errors. And it was argued by *Mr. Peere Williams* and *Mr. Raymond* at several days for the plaintiff in error, and by *Mr. Sergeant Darnall*, *Mr. Broderick*, and *Mr. Weld*, for the defendant in error. And the counsel for the plaintiff argued that the judgment was erroneous, and ought to be reversed, because the plaintiff had not entitled himself to his action of covenant; for he makes title to it as grantee of the reversion, and he has not entitled himself well to the reversion, because he makes title to it by lease and release, but he has not shown that the release was made upon any consideration, nor is there any use declared; the consequence of which is, that although the estate in law passed by the release from the releasor to the releasee, yet the use remained in the releasor, which drew back to it the estate in law again; and so the reversion continues, notwithstanding anything that appears to the contrary, in Thomas Ashby and his heirs; and therefore that the plaintiff could not maintain this action. And they argued, that although at common law he who had the estate in the land had also all that one could have there, uses not being then invented (for they were afterwards invented by the men of religion, after

all other attempts had been frustrated, to avoid the Statutes of Mortmain, Mag. Chart. c. 36, 7 Edw. I. *de religiosis*, West. 2, c. 32, as appears by 2 Leon. 14, Brent's Case,¹ and in the time of the wars between the Houses of Lancaster and York they were encouraged for the mutual convenience of both parties, in the preventing of escheats and forfeitures); nevertheless, after that they were invented, and that feoffments to uses were become a sort of common conveyance (which happened in the reigns of Henry VI. and Edward IV., as appears by the reports), the estate in the land, and the use of it, were regarded as distinct things: and then a man might have conveyed the estate to another, and retained the use to himself; or might have passed the estate to A. and the use to B., or might have granted the use and retained the estate to himself: but the conveyance of the estate in the land did not convey the use, unless a good consideration was mentioned in the conveyance; or that the intent of the parties appeared that the use should pass as well as the estate. Therefore, before the statute of 27 H. VIII. c. 10, if A. made a feoffment, levied a fine, or suffered a common recovery, without a use declared, and without consideration, of lands, &c., the feoffee, conusee, and recoveror stood seised of the said lands to the use of A. Then since the statute of Henry VIII. the law as to this matter is not altered; for the said statute intended only to execute the use in the possession, and by that means to destroy the use; but it did not intend to make any other thing pass by the conveyance than that which passed before. And therefore the use, not passing by the release in this case, drew back to itself the estate passed by it; and the statute executed it in possession. And to prove that a feoffment made without consideration or use declared would at this day be to the use of the feoffor, Dyer, 146; 2 Roll. Abr. 781, F.; Co. Litt. 271, 23, were cited. The same law of a fine. Beckwith's Case.² The same law of a recovery. Argoll v. Cheyney.³ - Now there is the same reason that the use should not pass by the release without consideration or use declared as for a feoffment, fine, or recovery. As to the precedents cited by the counsel for the defendant in error, where feoffments are pleaded without consideration shown, or use declared, Co. Entr. 410, 11; Herne, 25; Winch, Entr. 1120; 2 Brown, Entr. 152; Robins. Entr. 468, release pleaded to lessee for life without consideration or use shown. Co. Entr. 69; Rast. 694, &c., it was answered, that all these books passed *sub silentio*; but that one cannot show any case where it was adjudged that such a release would be to the use of the releasee; and that there are books where the pleading is to show the consideration or use. 2 Saund. 11, 277; 2 Ventr. 120; Co. Entr. 264, 220, 474, and the reason of the law as aforesaid is agreeable. As to the objection made by the defendant

¹ 2 Inst. 75.² 2 Rep. 58.³ Latch, 82; Palm. 462.

in error's counsel, and in this case it was sufficiently averred, that this release was to the use of the releasee, because it is said that *virtute cujus* he was seised, &c. And for this Dyer, 254 *b*; Cro. Eliz. 678; Cro. Car. 221; W. Jones, 245; Cro. Ja. 549; 2 Roll. Rep. 466; 3 Co. 44, were cited, where it is held that an averment with *virtute cujus* is sufficient. It was answered, that this was a conclusion without premises, or upon premises that will not warrant such a conclusion, and therefore it will not avail. And as to the cases cited, they were for the most part after verdict, which aids many defects. Another objection urged by the counsel of the other side was, that this release inured by way of enlargement for the lease for a year, and therefore would participate of the consideration of it, and that the lease and release made but one conveyance. But to that it was answered, that the lease and release made but one conveyance as to the passing of the fee; but that they were in truth distinct conveyances, and had different operations, the one by the statute of 27 H. VIII., the other by the common law. And as to what is said, that the release inures by way of enlargement of the estate of the lessee, it is true that it gives him a greater estate than he had before, but that notwithstanding it destroyed the estate for years by merger; and it cannot participate of the consideration contained in the lease, which is perfectly distinct. And the counsel for the plaintiff in error relied much upon the case in *Edwards v. Morgan*,¹ where in covenant brought by the assignee of the reversion against the lessee, judgment was stayed, because the plaintiff did not make mention in his declaration to whose use the grant of the reversion was, nor the consideration of the grant; which case seems to be in point. *Sed non allocatur*. For per HOLT, Chief Justice, before the statute of 27 H. VIII. c. 10, such pleading as in this case had doubtless been good, and the statute has not altered the way of pleading; but since the said statute, pleading of a feoffment, without showing the use or the consideration, with an averment *virtute cujus*, &c., has been held good. Plowd. 478. And the reason is, because though no use or consideration is shown in pleading of the feoffment, it does not follow from thence that such feoffment will be to the use of the feoffor; for that is matter of fact extrinsical from the deed, which might have been declared by parol before the statute of 29 Car. II. c. 3, and now by writing, though it be not a deed; and therefore if it was made to the use of the feoffor, it ought to be averred accordingly. But it would be hard that the judges should construe such a feoffment, or the release in this case, to the use of the feoffor or releasor, where it does not appear; but if they were made to such use, it ought to be shown on their side; and until that be shown, they must be intended to be made to the use of the feoffee and releasee, especially since the

¹ 3 Lev. 233.

statute of 27 H. VIII., for now if a feoffment or release should not be intended to be to the use of the feoffee or releasee, they would be vain and to no purpose; for, according to the case *Rolle v. Osborn*,¹ he would have his old estate, and the warranty would remain; and if the lands were of the part of the mother, they continue so. And therefore the reason of such feoffments and releases differs much from what they were before the 27 H. VIII., for then there might be some reason to continue the use to remain in the feoffor, &c., because, notwithstanding that, it was to some purpose, viz. to defraud the lord of his guardianship, or to conceal the tenancy of the freehold, &c. The case in Co. Lit. 23 is only, that where a man makes a feoffment without valuable consideration to divers particular uses, so much of the use as he makes no disposition of remains in him; and that is reasonable, because the reason of the making of the feoffment appears, viz. the raising of the particular uses. But in this case no reason of the making of the release appears, if it was not to the use of the releasee; and therefore it must be to the use of the releasee, till the contrary appears. But he agreed that if particular uses had been limited upon the release, all the other uses that had not been limited would be to the use of the releasor, according to Co. Lit. 23. All the other judges agreed with HOLT, Chief Justice. And GOULD, Justice, said that in the case of *Reynoldson v. Blake*, in C. B. Pasch. 9 Will. III. [see 3 Salk. 25, 40, 1 Ld. Ray. 192], the grant of a rectory was pleaded without averment of the consideration or use; and adjudged that it was well enough, the exception being taken by himself. Like the case of a confirmation of a rent service to the tenant for life of it, to hold to him and to his heirs; by this a fee passes to the tenant for life. Litt. sect. 549; Vaugh. 44.²

LORD ALTHAM v. THE EARL OF ANGLESEY.

IN THE QUEEN'S BENCH, EASTER TERM, 1709.

[Reported in *Gilbert*, 16.³]

ON an issue directed out of chancery, to be tried in B. R., the case appeared to be thus: Tenant in tail, remainder in tail, with remainders over. Tenant in tail, having a mind to dock the entail and bar the remainders, levies a fine with proclamation *sur conusance de droit come ceo*, &c., to J. S. and his heirs, in order to make him tenant to the precipe; but no use of this fine was declared. Seven years afterwards, a precipe was brought against J. S., who came in and vouched the conusor of the fine, who vouched over the common vouchee, and the

¹ Hob. 20.

² See *Walker v. Snow*, Palm. 359. — Ed.

³ s. c. 2 Salk. 676. — Ed.

question here was, if J. S. were a good tenant to the precipe, and the common recovery well suffered.¹

It was resolved by HOLT, C. J., POWEL, J., POWIS, J., and GOLD, J., that the said J. S. was a good tenant to the precipe, and that the recovery was well suffered and all the remainders barred.

This question doth arise principally upon the Statute of Frauds and Perjuries, 29 Car. II. c. 3, whereby it is enacted that all declarations or creations of trusts or confidences of any lands, tenements, or hereditaments, shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust, or else by his last will in writing, or else they shall be utterly void; provided always, that where any conveyance shall be made of any lands or tenements, by which a trust or confidence shall or may arise, or result by implication or construction of law, or be transferred or extinguished by an act or operation of law, then and in every such case such trust or confidence shall be of the like force and effect as the same would have been if this statute had not been made.

It was unanimously agreed that this statute did not extend to this case, viz. where there is only cognizor and cognizee, and that it extended only to third persons; though it was objected that, in this case, when, by the fine, the legal estate was conveyed to J. S. and his heirs, and no use declared of it, that the use did result to conusor and his heirs, and then, before the precipe was brought, the legal estate was out of the conusee, by virtue of the statute for transferring uses into possession. But HOLT, C. J., and POWEL, J., held in this case, that when a fine is levied or a feoffment made to a man and his heirs, the estate is in the conusee and feoffee, not as a use, but by the common law, and may be averred to be so; and for the form of pleading the averment you may see Co. Ent. 219, 220. Where a fine was levied, and the conusee, in pleading, averred, *Cujus quidem finis pretextu predicti*, J. S. *fuit seisitus de*, &c., *cum pertinent in Dominico suo ut de feodo*, and in Plowd. 477, 478. A feoffment was pleaded *habendum* to A. and his heirs for ever, *virtute cujus feoffment idem A. fuit seisitus de*, &c., *cum pertinent in Dominico suo ut de feodo*; and in this case it plainly appears that the intent of the fine was to make the said J. S. a tenant to the precipe for the common recovery, and when the common recovery is effected, a use shall arise by operation of law, from the conusor and his heirs,² from whom the estate first moved.

¹ A part of the case relating to a question of procedure is omitted. — ED.

² See the case of Long and Buckridge, Trin. 4 Georgii adjudged that the averment of *cujus quidem finis pretextu*, &c., is only *expressio eorum que tacite in sunt, et nihil operatur*, and that *prima facie* the fine shall pass the estate to the conusee; and to bring the use back to the conusor, the conusor must show that the intent was not to give it to the conusee; for else the conusee shall be deemed to take the estate by the common law. And this case of Lord Anglesey and Altham was there held to be good law.

HOLT, C. J., held that uses were not within this statute, but that the statute did restrain only the operation of trusts and confidences in chancery; but all the other justices held the contrary, and that uses were within it; for the common law makes no distinction between trusts and confidences, and uses; and there was no foundation to make a difference between trusts and uses, since the Statute 27 H. VIII., though they have done it in chancery; and now, since the Statute of Frauds, 29 Car. II. c. 3, no stranger can take a use by any parol averment.¹

If a fine be levied to a man and his heirs, to the use of him and his heirs, in this case he shall take by the common law and not by way of use; and in this case there may be a parol averment to prevent a resulting use to the conusor in fee; for when the fine is levied a use doth immediately arise, either to the conusor and his heirs or to the conusee and his heirs; and when there is a subsequent deed, it only shows what the intent of the parties was at the time of the fine levied: Dowman's Case; so that when a fine is levied a use doth arise by implication of law to the conusee and his heirs, and consequently this case is excepted out of the statute. The fine and recovery here make but one conveyance; and if the use should result to the conusor and his heirs, it would destroy the middle part of the conveyance, and defeat the plain intention of the parties, which was to put the use in the conusee; and this is evident, because the conusor, by suffering himself to be vouched, has owned it. And how could tenant in tail make himself tenant in fee, if so be this must be construed a resulting use?

As to an objection that was made, that there might be a long time between the fine and recovery; admitting that there had been a long time between the fine and recovery, yet there it may be made good by a parol averment before the Statute of Frauds, and by writing since, upon the reason of Dowman's Case, if nothing were done intermediate to the contrary. Dyer, 136.

GOLD said, that if a fine *sur conusans de droit come ceo, &c.*, were levied, a use did result to the conusor; but if the conusee did grant and render the lands to the conusor in tail, the conusee was seised of the reversion to his own use. Moor, 156; Dyer, 311. So if a feoffment be made to A. and his heirs, upon condition to enfeof B. and his heirs, without limiting or declaring any use. In this case, when A. has enfeofed B. and his heirs, a use shall arise to B. and his heirs; and in all cases of common recoveries a tenant to the precipe shall be presumed, and that as well in a new recovery as in an old one.²

¹ "It was also ruled that the Statute of Frauds and Perjuries, which says, 'that all conveyances, where trusts and confidences shall arise or result by implication of law, shall be as if that act had never been,' must relate to *trusts* and *equitable interests*, and cannot relate to a *use*, which is a legal estate." *Lamplugh v. Lamplugh*, 3 P. Wms. 112.

² See *Humphreston's Case*, 2 Leon. 216, pl. 275. — ED.

LLOYD AND JOBSON v. SPILLET AND OTHERS.

IN CHANCERY, BEFORE LORD HARDWICKE, C., MARCH 12, 1740.

[Reported in 2 Atkyns, 148.]

JOHN STAMP being seised of a considerable real estate and possessed of a large personal estate, made his will, dated the 28th of March, 1721, and afterwards a codicil of the 10th of October, 1721, and appointed John House and John Spillet his trustees, to see what he had done in his lifetime be continued as he ordered, and then gave his cousins, Anne and Mary Jobson, £15 a year apiece, during their lives, and directed his trustees to improve all his estate to the best advantage, and that the yearly profits thereof should be given to and for the yearly maintenance of such ministers as were called by the name of Presbyterian and Independent ministers, that do not receive above £40 a year for their preaching. The testator afterwards added Richard Froome to the other two trustees, and on the 7th of December, 1721, there was an indenture of release duly executed between John Stamp of the one part, and House, Froome, and Spillet of the other part, witnessing that Stamp, as well for and in consideration of the natural love and affection which he bore unto his cousins, House, Froome, and his friend Spillet, and also in consideration of ten shillings paid by them, granted to them several messuages and farms therein mentioned, to hold to them, their heirs and assigns, to the use of them, their heirs and assigns, for ever; provided always, &c., that if Stamp should, at any time during his life, tender or pay to House, &c., ten shillings, on purpose to make void the said deed and the estates thereby conveyed, then the deeds and the estates thereby limited should be void. John Stamp did also execute a deed-poll of his personal estate to House, Froome, and Spillet, whereby John Stamp, in consideration of ten shillings, and other good causes, bargained and sold to House, &c., all his goods and chattels, to hold to them, their executors, &c., and put them in possession of all the premises by the delivery of five shillings to them; and it was agreed between the parties that Stamp should have the rents and profits of the premises during his life, for the maintenance of himself and family, and a power was reserved to Stamp to make void this deed by any deed or writing, and to dispose of the premises as he should think fit; and he had power, also, to revoke the lease and release.

The bill is brought by the plaintiffs as heirs-at-law to John Stamp, and the end of it is, that the defendants may convey John Stamp's real estate

to the plaintiffs and their heirs, and account for the rents and their share of the personal estate, and deliver up the deeds of bargain and sale, and lease and release, and the title-deeds.

The defendants insist on their right to the real and personal estate, by virtue of the will and conveyances of John Stamp, and in regard it is by law declared that if his heirs should commence any suit relating to his will, that then it should be void: they submit to the court that if the plaintiffs had any title to their annuities of £15 each, they have forfeited the same by bringing this suit.

First. With regard to the personal estate; I am of opinion there are no grounds for the present plaintiffs to be relieved, according to the prayer of their bill.

For here is an assignment or bill of sale of all his goods and chattels and all other his substance whatsoever, movable or immovable, quick or dead, to his trustees during his life, for the maintenance of himself and family, with another proviso to revoke the uses of this deed by any other deed or writing, or even by cancelling, without any form or ceremony whatsoever.

A man makes a will antecedent to a deed, in which he has given away all his personal estate to charitable uses.

Now, whether a man, after a will made, reserves a trust in what was his personal property before, or acquired after, the will is ambulatory, till his death, and therefore, as to the next of kin, there is no pretence that the personal estate is devisable under the Statute of Distributions.

Secondly. As to the legal estate, whether it will pass by the lease and release without a consideration.

Now there are no grounds whatsoever to say that the legal estate did not pass by the lease and release.

For the considerations in it are such as will operate by way of transmutation of possession.

In the first place, here is a consideration expressed of natural affection to two persons, who are not disputed to be very nearly related to the grantor, and here is likewise the consideration of ten shillings; but there is no manner of doubt the estate would have passed even without the last pecuniary consideration, under the Statute of Uses, for natural love and affection is very sufficient to create a use, and will amount to a covenant to stand seised, though no other consideration appear.

But then it has been insisted here is not a sufficient consideration to pass the beneficial interest in this estate.

The consideration of ten shillings, it is said, is only a form in the conveyance, and not sufficient of itself to pass the estate; neither will the consideration of natural love and affection alone pass it.

But I do not think these observations material in the present case.

Consider how it stood at common law before the Statute of Uses ; there was no necessity then that there should be any consideration expressed to pass the estate.

As, for instance, in the case of feoffments, there was no consideration at all mentioned in them ; and yet the estate passed by them from the operation of law.

In process of time, for the sake of avoiding forfeitures to the crown, when the contests arose between the two Houses of York and Lancaster, and likewise to avoid wardships, both of them with a fraudulent intention to cheat the crown and the lord of what the law gave them, uses were introduced, and were exactly the same with what trusts are now, and I wonder how they ever came to be distinguished.

The doctrine of a resulting use first introduced the notion that there must be a consideration expressed in the deed of feoffment, or otherwise nothing could pass, but it would result to the feoffor.

And so it is insisted on here, that, though the legal estate passes by the Statute of Uses, yet the beneficial interest will not pass, as there is not what the court calls a valuable consideration ; and, consequently, there is a resulting trust for the heir.

I am now bound down by the Statute of Frauds and Perjuries, to construe nothing a resulting trust but what are there called trusts by operation of law ; and what are those ? Why, first, when an estate is purchased in the name of one person, but the money or consideration is given by another ; or, secondly, where a trust is declared only as to part, and nothing said as to the rest, what remains undisposed of results to the heir-at-law, and they cannot be said to be trustees for the residue.

I do not know in any other instance besides these two where this court have declared resulting trusts by operation of law, unless in cases of fraud, and where transactions have been carried on *mala fide*.

But in the present case there is no fraud at all in the grantees, but a scheme in the plaintiff's ancestor to secure the charity at all events, supposing he should revoke his will.

It has been said that it was not the intention to give this estate to the defendant, and consequently the heir-at-law is entitled : for the heir-at-law does not want an express intention ; and it is certainly so in the case of a will, but it is otherwise with regard to a deed.

For there, since the Statute of Frauds and Perjuries, the lines are exactly drawn with regard to resulting trusts, and the heir-at-law must show an express trust for him in order to entitle himself.

A man that conveys a trust to another, and barely for himself, or for the use of his heir-at-law, does not generally insert a power of revocation, as has been done in the present case.

Upon the whole, I am of opinion that the legal estate did well pass,

and the beneficial interest likewise ; nor do I believe there was any intention that there should be a resulting trust for the heir-at-law, but the whole design of the plaintiff's ancestor was to secure the charity at all events.

LORD HARDWICKE, therefore, said he saw no cause to vary the decree of the 8th of November, 1734, and ordered the same should be affirmed ; but declared that the plaintiffs, the heirs-at-law of John Stamp, were entitled to the two annuities of £15 each, devised to them by the testator for their lives, and directed the arrears and growing payments to be paid to the plaintiffs.¹

ARMSTRONG, OF THE DEVISE OF NEVE, v. WOLSEY.

IN THE COMMON PLEAS, HILARY TERM, 1755.

[Reported in 2 Wilson, 19.]

EJECTMENT, tried at Norwich before PARKER, Chief Baron, who reserved this short case for the opinion of the court. A. B. being in possession of the lands in question, levied a fine *sur conusans de droit come ceo*, &c., with proclamations to the conusee and his heirs, in the sixth year of the present king, without any consideration expressed, and without declaring any use thereof ; nor was it proved that the conusee was ever in possession.

So that the single question is, whether the fine shall inure to the use of the conusor or the conusee. And after two arguments, the court was unanimous, and gave judgment for the plaintiff, who claimed as heir of the conusor.

Curia. In the case of a fine *come ceo*, &c., where no uses are declared, whether the conusor be in possession, or the fine be of a reversion, it shall inure to the old uses, and the conusor shall be in of the old use ; and although it passes nothing, yet after five years and non-claim it will operate as a bar.

And in the case of a recovery suffered, the same shall inure to the use of him who suffers it (who is commonly the vouchee), if no uses be declared : but he gains a new estate to him and his heirs general ; and although before the recovery he was seized *ex parte materna*, yet afterwards the estate will descend to his heirs *ex parte paterna*,² as was determined in *Martin v. Strachan*.³

¹ Reg. Lib. B. 1740, fol. 155 ; Reg. Lib. B. 1734, fol. 74.

² Conf. *Godbold v. Freestone*, 3 Lev. 406 ; *Abbot v. Burton*, 2 Salk. 590 (see also 2 P. Wms. 139) ; *Read v. Erington*, Cro. El. 321 ; *Martin v. Strachan*,

³ 1 Wils. 2, 66 ; *sed vid.* that case 2 Stra. 1179.

In the case at bar, the ancient use was in the conusor at the time of levying the fine; and it seems to have been long settled before this case, that a fine without any consideration, or uses thereof declared, shall inure to the ancient use in whomsoever it was at the time of levying the fine; and as it was here in the conusor at that time, the judgment must be for the plaintiff.¹

LEMAN v. WHITLEY.

IN CHANCERY, BEFORE SIR JOHN LEACH, M. R., APRIL 24,
MAY 5, 1828.

[Reported in 4 Russell, 423.]

THE plaintiff, by deeds of lease and release, dated the 21st and 22d of December, 1819, conveyed the estate in question to his father; in consideration, as it was expressed in the deed of release, of a sum of £400 paid by the father to the plaintiff. The bill alleged that the plaintiff, while in distressed circumstances, and not in good credit, being desirous to raise money upon mortgage of this estate, was advised by the attorney, who was employed as well by the father as by the plaintiff, that he could much more readily procure the money on mortgage if it appeared that the estate on which the security was to be given was the father's property, and that the money was raised for the use of the father, who was in good credit, than if the transaction was understood to be a dealing with the plaintiff; that the attorney recommended, therefore, that the plaintiff should convey the estate to the father, so that it should appear to be his property; and that the deeds of lease and release to the father were prepared and executed in pursuance of that advice, with the consent of the father, but that no part of the alleged consideration had been paid.

5 T. R. 107, n. In the case last cited, Lee, C. J., said: "The rule of descent is well known, and will be agreed. If a man seised as heir on the side of the mother make a feoffment in fee to the use of himself and his heirs, the use being a thing in trust and confidence shall ensue the nature of the lands, and shall descend to the heir on the part of the mother. Co. Lit. 13 a, 3 Lev. 406, Godbolt v. Freestone. And it will be the same if the limitation be by fine and recovery; it is still the ancient use; and there is no difference whether upon the conveyance of an estate any part of the use result by implication of law, or whether it be reserved by express declaration to the party from whom the estate moved; and so is the case of Abbot v. Burton, Salk. 590. But this rule holds only where lands come *by descent*, and not where a person takes *by purchase*." See also Price v. Langford, 1 Salk. 337. — ED.

¹ Bro. Ab. *Feoff. al Uses*, pl. 37 (*semble*); Villers v. Beaumont, Dy. 146 (*semble*); Beckwith's Case, 2 Rep. 58 a; Bury v. Taylor, Godb. 180, pl. 253; Argoll v. Cheney, Palm. 405; Noy, 77; Latch, 82, s. c.; Roe v. Popham, Doug. 25, *accord*. — ED.

The father died in the month of May, 1820, having, by his will, made subsequently to the execution of the deeds of lease and release, devised all his real estates, in general words, to an infant son of the plaintiff, with remainders over.

It appeared that steps had been taken by the attorney towards raising money on mortgage in the name of the father, but that no mortgage was completed in his lifetime. The attorney, having possession of the title-deeds, was made a defendant in the cause, and by his answer admitted the facts as stated in the bill. He had likewise been examined as a witness for the plaintiff; and his evidence was to the same effect.

The bill prayed that the devisees of the father might be declared to be trustees for the plaintiff; that they might account to him for the rents and profits since the father's death; and that the estate might be reconveyed to him.

The evidence was read *de bene esse*; and the question was, whether on such facts so disclosed by parol testimony, the court could declare a trust in favor of the plaintiff.

Mr. Treslove and *Mr. Crompton*, for the plaintiff. There are many circumstances that will suffice to take a case out of the provision of the Statute of Frauds, which requires all declarations of trust as to lands to be in writing. "There is," says Lord Hardwicke, in *Willis v. Willis*,¹ "another way of taking a case out of the statute, and that, by admitting parol evidence, within the rules laid down in this court, to show the trust, from the mean circumstances in the pretended owner of the real estate of inheritance, which makes it impossible for him to be the purchaser." *Cripps v. Jee*;² *Maxwell v. Montacute*;³ *Lady Tyrrell's Case*;⁴ *Lady Bellasis v. Compton*;⁵ *Woodhouse v. Brayfield*;⁶ *Lloyd v. Spillet*;⁷ *Cottington v. Fletcher*;⁸ *Young v. Peachey*;⁹ *Birch v. Blagrove*;¹⁰ *Lench v. Lench*.¹¹ Unquestionably evidence might be received that the purchase-money, which is stated in the deeds as the consideration of the conveyance, was never paid. Why was it not paid? Because it never was the intention of the parties that any consideration should pass from the father to the son, and the transaction was merely colorable. The true facts of the case are thus brought properly before the court; and, according to those facts, and not according to the tenor of the formal conveyance, must the rights of the parties be declared.

Mr. Beames, contra. None of the cases which have been cited resemble the present. In some of them there was fraud; in some of

¹ 2 Atk. 71.² 4 Bro. C. C. 472.³ Prec. in Chan. 526.⁴ Freem. 304.⁵ 2 Vern. 294.⁶ 2 Vern. 307.⁷ 2 Atk. 148, and Barnard. 384.⁸ 2 Atk. 155.⁹ 2 Atk. 254.¹⁰ Amb. 264.¹¹ 10 Ves. 511.

them there was mistake ; in some of them there was evidence in writing that the written conveyance did not disclose the true nature of the transaction and the true intent of the parties : but in no case has parol evidence been received in order to raise a trust contrary to the effect of a written instrument, where, as here, neither fraud nor mistake is alleged, and where all that appears in writing is in opposition to the claim set up by the bill.

THE MASTER OF THE ROLLS. The question in this cause would regularly have arisen upon an objection to the admissibility of parol evidence of the alleged trust. There can be no doubt of the moral honesty of the claim made by this bill. But the question is, whether the plaintiff can be relieved consistently with the provisions of the Statute of Frauds, which, although it may bear hard upon the plaintiff in the particular case, was certainly called for by the public interest.

There is here no pretence of fraud, nor is there any misapprehension of the parties with respect to the effect of the instruments. It was intended that the father should by legal instruments appear to be the legal owner of the estate. There is here no trust arising or resulting by the implication or construction of law. The case of *Cripps v. Jee* is the nearest to this case in its circumstances. There, the estate being subject to certain incumbrances, the grantor mortgaged the equity of redemption by deeds of lease and release to two persons of the name of Rogers, as purchasers, for a consideration stated in the deed ; the real intention of the parties being that the Rogerses should be mere trustees for the grantor, and should proceed to sell the estate, and, after paying the incumbrances, should pay the surplus money to the grantor. In the book of accounts of one of the Rogerses there appeared an entry in his handwriting of a year's interest paid to an incumbrancer on the estate, on account of the grantor, and other entries of the repayment of that interest to Rogers by the grantor ; and there was also evidence of a note and bond given by the Rogerses to a creditor of the grantor, in which they stated themselves to be trustees of the estate of the grantor. Lord Kenyon held that, this written evidence being inconsistent with the fact that the Rogerses were the actual purchasers of the equity of redemption, further evidence was admissible to prove the truth of the transaction. Unfortunately, there is here no evidence in writing, which is inconsistent with the fact that the father was the actual purchaser of this estate ; and it does appear to me, that to give effect to the trust here would be in truth to repeal the Statute of Frauds.

Considering myself bound, therefore, to treat this case as a purchase by the father from the plaintiff, there does, however, arise an equity for the plaintiff, which, consistently with the facts stated and proved, and under the prayer for general relief, he is entitled to claim. It is stated and proved that no part of the alleged price or consideration of

\$400 was ever paid by the father to the plaintiff; and the plaintiff therefore, as vendor, has a lien on the estate for this sum of \$400; and the decree must be accordingly.¹

¹ In Leake's "Digest of the Law of Property in Land," 134, the learned author says: "Where a conveyance is made without any declaration of trust, and without any payment of purchase-money whence to infer a trust or disposal of the beneficial interest, it is presumed to be made for the benefit of the legal grantee. The rule is different with uses, as has been seen, for absence of consideration and of declared intention raises a resulting use in the grantor. Thus, a grant to A. and his heirs, without any declaration of use and without any consideration to raise a use, imports a resulting use in the grantor, which is executed by the statute, and the estate remains in him as before; but a grant to A. and his heirs to the use of B. and his heirs conveys the legal and equitable interest to B., although there be no consideration given or express appropriation of the beneficial interest, and there is no resulting trust."

Mr. Lewin, on the other hand, in his "Treatise on the Law of Trusts" (7th ed.), 131, makes the following statement: "If an estate be granted either without consideration or for merely a nominal one, and no trust is declared of *any part*, then if the conveyance be simply to a *stranger and no intention appear of conferring the beneficial interest*, as the law will not suppose a person to part with property without some inducement thereto, a trust of the *whole estate* (as in the analogous case of uses before the statute of Henry VIII.) will result to the settlor. And if two joint tenants make such a conveyance without consideration, the equitable interest will result to them in joint tenancy."

The cases cited by Mr. Lewin hardly warrant his statement. For with three exceptions they are cases of trusts in personal property, of resulting trusts by the payment of purchase-money, or of constructive trusts on the ground of fraud. Furthermore, of the three exceptions, two — namely, Lady Tyrrell's Case (1674), Freem. C. C. 304, and Warman v. Seaman (1675), Freem. C. C. 308 — were prior to the Statute of Frauds; and in them as well as in the third — Rex v. Williams, Bunb. 342 — the decision did not necessarily involve the question of a resulting trust.

Where personal property is transferred without consideration, whether the transaction is a gift or a transfer upon trust for the transferee depends naturally upon the intention of the transferor, and parol evidence of the intent is of course admissible. But, in the absence of evidence, the presumption of a gift would seem to be a natural one. In George v. Howard, 7 Price, 651, Richards, C. B., said: "The case of Rider v. Kidder [10 Ves. 360] does not apply. That was argued on this ground, that the intestate having purchased the stock with his own money, and transferred it into his own name and that of another person, the presumption is that the other person, if a stranger, is merely a trustee for him whose money it was: and so it might have been presumed here, perhaps, if such were the facts; but in this case stock already purchased and invested was transferred into the name of the owner and the defendant; and if I deliver over money, or transfer stock to another, even although he should be a stranger, it would be *prima facie* a gift." But in Freeman v. Tatham, 5 Hare, 337, Sir James Wigram, V. C., said, referring to the case of Rider v. Kidder: "I do not understand the distinction attempted to be drawn between a transfer and a purchase." In Pascoe v. Pascoe, Sir George Jessel, M. R., said, p. 345, n. 1, that he "did not understand that the law of this court made any difference between a transfer and a purchase, — a purchase of stock in the joint names of the beneficial owner and another, or a transfer from that beneficial owner in the joint names of himself or herself, or a transfer to a third name from the beneficial owner into another name. In either case,

in the absence of evidence to the contrary, there was a resulting trust in favor of the beneficial owner." See also *Tucker v. Barrow*, 2 H. & M. 526, per Wood, V. C.

In the same case, on appeal, Sir W. M. James, L. J., said, p. 348 : "I will assume that the implication of a resulting trust does arise as much in the case of a transfer as in that of a purchase of stock, although that is certainly not the case with regard to a conveyance of land."

In the following cases it was held, upon the evidence, that there was a gift : *Crabb v. Crabb*, 1 M. & K. 511 ; *Kilpin v. Kilpin*, 1 M. & K. 520 ; *Dummer v. Pitcher*, 2 M. & K. 262 ; *Deacon v. Colquhoun*, 2 Drew. 21 ; *Batstone v. Salter*, L. R. 19 Eq. 250 ; L. R. 10 Ch. Ap. 438, s. c. ; *Fowkes v. Pascoe*, L. R. 10 Ch. Ap. 343.

In the following cases it was held, upon the evidence, that the transfer was upon a trust for the transferror : *Duke of Norfolk v. Browne*, Prec. Ch. 80 ; *Hayes v. Kingdome*, 1 Vern. 33 ; *Sculthorp v. Burgess*, 1 Ves. Jr. 91 ; *Custance v. Cunningham*, 13 Beav. 363 ; *Forrest v. Forrest*, 34 L. J. Ch. 428. — ED.

JOHN BLODGETT AND OTHERS v. EPHRAIM HILDRETH.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, JANUARY TERM,
1870.

[*Reported in 103 Massachusetts Reports, 484.*]

BILL in equity by the heirs of Sarah M. Blodgett, to redeem one undivided half of a parcel of land in Townsend from a mortgage held by the defendant. At the hearing, before Morton, J., there appeared the following facts, on which the case was reserved for the consideration of the full court.

John W. Swallow, owning the land in question, mortgaged it to Jephthah Cummings, and died in 1840, intestate, leaving his four sisters, Alice M. Swallow, Sophronia Swallow, Sarah M. Blodgett, and Lucinda S. Hildreth, his heirs. No administration was taken on his estate. In 1843, Alice, Sarah, and Lucinda made "a deed of quitclaim" of the premises to Sophronia, the husbands of Sarah and Lucinda joining therein; afterwards Alice died, unmarried and childless; then Sarah died intestate, leaving the plaintiffs her heirs; and then Sophronia died, intestate, unmarried, and childless. Subsequently the mortgage to Cummings was assigned to Lucinda, and she afterwards conveyed the premises by quitclaim deeds through a third person to her husband, the defendant, and in 1857 died.

The defendant contended that the deed made to Sophronia by her sisters was made in trust for the sole use and benefit of Lucinda; and he was allowed to introduce in evidence, against the objection of the plaintiffs, a letter written in 1853 by Sophronia to Lucinda, containing this passage: "I intend to settle up our affairs, and give up your deeds that you intrusted me with."

The defendant was also allowed, against the plaintiff's objection, to introduce oral evidence showing that the heirs of John W. Swallow made an oral agreement that Lucinda should take the premises, she agreeing to pay all her brother's debts and to pay \$25 to each of her sisters; that, in pursuance of this agreement, the deed of 1843 was made to Sophronia, at the request of Lucinda, and to be held in trust for her; that at the time the deed was made Sophronia paid some of her brother's debts out of money in her hands belonging to Lucinda, and Lucinda's husband, the defendant, gave Sophronia a receipt in full of a debt due to him from her brother's estate; that, after the deed was made and delivered to Sophronia, Lucinda, from time to time, paid the other debts of her brother, and also paid \$25 to each of her sisters; that, after the making of the deed to Sophronia, Lucinda and the defendant paid the taxes on the premises up to the time of Sophronia's

death, since which time the plaintiffs voluntarily paid one-half of the taxes; and that Lucinda, at the time of making the deed to Sophronia, held promissory notes against her brother, which were found among her papers at her death, and were now in the possession of the defendant.

D. S. Richardson, for the plaintiffs.

F. A. Worcester, for the defendant.

WELLS, J. 1. The writing produced in this case is not sufficient to satisfy the requirements of the Statute of Frauds. It fails to identify the property or interests to which it relates, or to afford means by which its identity may be made certain. It does not disclose the terms of the trust, or the conditions upon which the sister was entitled to have the deeds surrendered to her. The trust must be established, if at all, by implication of law.

2. As to Sophronia's original share of the land, the case stands merely upon an oral agreement to hold it for the benefit of Lucinda, and payment of the value or consideration therefor. This will not create a valid trust. Gen. Sts. c. 100, § 19. Payment of the whole purchase-money will not take an oral agreement concerning land out of the Statute of Frauds. *Purcell v. Miner*; ¹ *Thompson v. Gould*; ² *Glass v. Hulbert*.³ Lands already held by a party cannot be charged with an implied or resulting trust by reason of the receipt of money upon an oral agreement of sale or trust. *Rogers v. Murray*; ⁴ *Forsyth v. Clark*.⁵

3. As to the share of Lucinda, conveyed by her to Sophronia without consideration and upon an agreement to reconvey or hold it for the benefit of Lucinda, no valid trust arises from that transaction. *Walker v. Locke*.⁶ A voluntary deed is valid between the parties as a gift, and does not raise any trust in favor of the grantor. It is otherwise with a feoffment, and perhaps in other conveyances whenever there is no declaration of the uses and the consideration is open to inquiry in determining the effect of the deed between the parties and their privies. Cruise Dig. (Greenl. ed.) tit. 11, c. 4, § 16, and tit. 32, c. 2, § 38. In this Commonwealth the consideration is not open to such inquiry. Supposing the deed in question to have been in the common form, the recital of a consideration, and the declaration of the use to the grantee and her heirs in the *habendum*, are both conclusive between the parties, and exclude any resulting trust to the grantor.⁷ *Squire v.*

¹ 4 Wall. 513.

² 20 Pick. 134.

³ 102 Mass. 24.

⁴ 3 Paige, 390.

⁵ 3 Wend. 637, 651.

⁶ 5 Cush. 90.

⁷ *Dean v. Dean*, 6 Conn. 285; *Irwin v. Ivers*, 7 Ind. 308; *Ratliff v. Ellis*, 2 Iowa, 59; *Morrall v. Waterson*, 7 Kan. 199; *Philbrook v. Delano*, 29 Me. 410; *Gerry v. Stimson*, 60 Me. 186; *Walker v. Locke*, 5 Cush. 90; *Bartlett v. Bartlett*, 14 Gray, 277; *Titcomb v. Morrill*, 10 All. 15; *Gould v. Lynde*, 114 Mass. 366; *Jackson v. Cleveland*, 15 Mich. 94; *Palmer v. Sterling*, 41 Mich. 218; *Graves v. Graves*, 29 N. H. 129; *Farrington v. Barr*, 36 N. H. 86; *Moore v. Moore*, 38 N. H. 332; *Hogan v.*

Harder;¹ Hill on Trustees, 112; 2 Story Eq. § 1197; Philbrook v. Delano;² Farrington v. Barr;³ Graves v. Graves.⁴

A trust may be established in favor of one who furnished the consideration, where a deed has been taken to a third party, because in that case the supposed *cestui que trust*, not being party to the deed, is not estopped by its recitals or covenants from proving all the facts from which such a trust will result. *Livermore v. Aldrich*.⁵

4. The two shares conveyed to Sophronia by the other two sisters come within the conditions from which a trust is held to result, by implication of law, in favor of the party who is the real purchaser and furnishes the consideration. It need not be money advanced or paid at the time of the conveyance. The mode, time, and form in which the consideration was rendered are immaterial, provided they were in pursuance of the contract of purchase. It is sufficient if that which in fact formed the consideration of the deed moved from the party for whom the trust is claimed to exist, or was furnished in her behalf, or upon her credit. The trust results from the purchase and payment of the consideration by or for one party, and the conveyance of the land to another. The receipt of a deed of conveyance founded on such a transaction raises a presumption that it was taken for the benefit of the party supplying the consideration. 2 Story Eq. § 1201. The implication of a trust from these facts may be overcome and disproved, or corroborated, by any oral or written testimony showing the circumstances of the transaction, and the expressed or probable intentions of the parties. Their admissions at the time or afterwards are competent to be proved. So also are their agreements; but agreements not in writing have no force otherwise than as admissions tending to destroy or confirm the inference otherwise deducible from the facts of payment of the consideration and deed to a third party. The trust results only from that inference. *Adams Eq. 33*; *Hill on Trustees, 96, 97*; *Botsford v. Burr*.⁶

Upon the report in this case, it appears that the whole consideration of the deed to Sophronia moved from Lucinda. It consisted partly in payments made at the time, out of money belonging to Lucinda, partly in payments then undertaken to be made, and subsequently made by her, and partly in the release or surrender of claims against the estate of their deceased brother. All these payments, releases, and undertakings were for the use and benefit of the grantors, either directly or

Jaques, 4 C. E. Green, 123; *Jackson v. Garnsey, 16 Johns. 189*; *Rathbun v. Rathbun, 6 Barb. 105*; *Sturtevant v. Sturtevant, 20 N. Y. 39*; *Miller v. Stokely, 5 Ohio St. 194*; *Wright v. Gould, 2 Wis. 552*; *Rasdall v. Rasdall, 9 Wis. 379, accord.*

But see *Russ v. Mebius, 16 Cal. 350*. — Ed.

¹ 1 Paige, 494.

² 29 Me. 410.

³ 36 N. H. 86.

⁴ 9 Foster, 129.

⁵ 5 Cush. 431.

⁶ 2 Johns. Ch. 405.

indirectly. It is enough, however, that, whatever of consideration there was, it moved from Lucinda. Proof of payments made subsequently has no other effect than to show that there was no failure of the consideration agreed upon when the deed was made, and on which it rested.

The other facts, including the letter of Sophronia, relied on as a declaration of trust, tend to corroborate and strengthen the implication of law which arises from payment of the consideration.

The fact that Lucinda joined in the same deed of quitclaim, in order to convey her own share to Sophronia, does not create any estoppel against her, beyond the interest which she conveyed. The deed is not set forth in the pleadings, nor in the report; and we are not to presume that Lucinda entered into any covenants, in relation to the shares conveyed by her sisters, which estop her from proving the facts from which an implied trust may result in her own favor. Her covenants, if any, in the deed, would be construed as extending only to the estate conveyed by her, unless the terms in which they are expressed require a different construction. *Blanchard v. Brooks*; ¹ *Allen v. Holton*; ² *Sweet v. Brown*.³

The result is, that one half of the estate was held by Sophronia in trust for Lucinda; and the plaintiff, if permitted to redeem, would at once be compelled to release it, in fulfilment of that trust. As to the other half, as no trust is legally established, it passed, upon the death of Sophronia, in equal shares to Lucinda and the representatives of Mrs. Blodgett, neither Sophronia nor her sister Alice M. having left issue.

The plaintiffs are therefore entitled to redeem one fourth part of the premises. If the parties shall not agree upon the amount to be paid upon such redemption, a master must be appointed to ascertain the amount.

Decree accordingly.

¹ 12 Pick. 47.

² 20 Pick. 458.

³ 12 Met. 175.

SECTION V.

Where the Purchase-money is paid by one Person and the Conveyance is taken in the Name of another.

ANONYMOUS.

1542.

[*Brooke's Abridgment, Feoffments at Uses, placitum 51.*]

A MAN purchased land, and caused the estate to be made to him and his wife, and to three others in fee ; this shall be taken to the use of the husband only, and not to the use of the wife without special matter to induce this, and so *vide*, a wife may be seised to the use of her husband, and there was such a feoffment, anno 3 Hen. VII., and declared *ut supra, quod nota*.

FORD LORD GREY v. LADY GREY AND OTHERS, *Et e contra*.

IN CHANCERY, BEFORE LORD FINCH, C., MARCH 26, 1677.

[*Reported in 1 Chancery Cases, 296.*¹]

WILLIAM LORD GREY had issue, Thomas, his eldest son, and Ralph, his second son : William, the father, for £13,000, purchased the manor of Gosfield in the name of Thomas and his heirs, and he enjoyed it, and took the rents and bought other lands adjoining in his own name, and added them to the park, and enclosed them therewith, and owned all as his own sometimes ; and Thomas declared several times that the manor was his father's, not his, or to that effect. But on the other side divers speeches of his father's were proved, that it was his son's, and the son by his will gave the manor to his father for life ; and divers speeches also by the son and father that the manor was Thomas his manor, and the father proved the said will, being executor.

The question was, whether the purchase was a trust in Thomas for the father, or an advancement by the father to the son. And decreed an advancement, not a trust. And whereas the father did, after the death of Thomas, convey Gosfield and three other manors in trust to raise £2,000 for two other of his grandchildren, Ralph and Charles, Gosfield was not liable thereto.²

¹ 2 Swan. 594 ; Finch, 338 ; Freem. C. C. 6, s. o. — ED.

² Lady Gorge's Case, Cro. Car. 550 (cited) ; Scroope v. Scroope, 1 Ch. Ca. 27 ;

ELLIOT v. ELLIOT.

IN CHANCERY, BEFORE LORD FINCH, C., JULY 3, 1677.

[Reported in 2 Cases in Chancery, 231.]

THE grandfather, mortgagee, purchaseth to himself the equity of redemption; and having two sons, the eldest took ill courses, and had killed a man: the grandfather and the mortgagor joined in a conveyance to Thomas his youngest son, but no consideration expressed, nor trust expressed; but the grandfather continued in possession, and leased, received the rents, and by his last will devised the lands to Thomas, but expressed not for what estate, and died.

The question was, whether the conveyance to Thomas should be taken to be in trust for the grandfather, according to the usual rule, or no. And the question arose between the son of Thomas and the heir-at-law.

Against the heir-at-law, and to make it no trust:

1st. Where the father purchaseth in the name of his son, it hath been frequently decreed to be an advancement and not a trust, though the father take the profits and keep possession; and though the father after such purchase declare the trust, yet it is not good unless the trust be declared before or at the time of the purchase.

And so now the LORD CHANCELLOR agreed.

2dly. It was objected that the reason why this court had so as before decreed, was in pursuance of the reason of the common law: a feoffment is made by the father to the son generally, no use riseth back to the father, unless it be expressed.

3dly. The will expressing no estate, contradicts not the rule; but one witness doth expressly depose that the grandfather's direction was to devise, &c., to Thomas and his heirs; and another witness deposed *ad idem*, to the best of his remembrance, and as he believed, which was not pressed as if such parol declaration could enlarge the will, but as an evidence of the trust and intent; and there was reason to do so, because of the disorder of the elder son.

But the LORD CHANCELLOR decreed it a trust for the grandfather, and took the difference between a son formerly married and provided for, and between a son unprovided for. In the latter case, if the father purchased land in the name of a son, and pay for it, or convey land

Freem. C. C. 171, s. c.; Anon., Freem. C. C. 128; Mumma v. Mumma, 2 Vern. 19; Shales v. Shales, Freem. C. C. 252; Lamplugh v. Lamplugh, 1 P. Wms. 111; Taylor v. Taylor, 1 Atk. 386; Redington v. Redington, 3 Ridg. P. C. 106, *accord*.

Conf. Jennings v. Selleck, 1 Vern. 467. — ED.

to his son, it shall be taken not to be a trust *ut supra*, but to be an advancement or provision for the son, because the father is under an obligation of duty and conscience to provide for his child in such case; but after he hath provided for him, he is under no farther obligation to provide more than for a stranger, and else no father could trust his child; and this difference I take, and shall always observe, and the proof is defective to alter the case.¹

ANONYMOUS.

IN CHANCERY, EASTER TERM, 1683.

[*Reported in 2 Ventris*, 361.]

WHERE a man buys land in another's name, and pays money, it will be a trust for him that pays the money, though no deed declaring the trust, for the statute of 29 Car. II., called the Statute of Frauds, doth not extend to trusts raised by operation of law.²

DYER v. DYER.

IN THE EXCHEQUER, NOVEMBER 20, 21, 27, 1788.

[*Reported in 2 Cox*, 92.³]

IN 1737, certain copyhold premises holden of the manor of Heytesbury, in the county of Wilts, were granted by the lord, according to the custom of that manor, to Simon Dyer (the plaintiff's father), and Mary his wife, and the defendant William (his other son), to take in succession for their lives, and to the longest liver of them. The purchase-money was paid by Simon Dyer, the father. He survived his wife, and lived until 1785, and then died, having made his will, and

¹ *Pole v. Pole*, 1 Ves. 76, *accord*.

In *Binion v. Stone* (1663), Nels. 68, Freem. C. C. 169, s. c., the presumption of an advancement was held to be rebutted by the infancy of the son. But this case is overruled. *Anon.*, Freem. C. C. 128; *Mumma v. Mumma*, 2 Vern. 19. — Ed.

² *Hungate v. Hungate*, Tothill, 120; *Bury v. Taylor*, Godb. 180, pl. 253; *Pelly v. Maddin*, 21 Vin. Abr. 498; *Willis v. Willis*, 2 Atk. 71; and the following cases relating to copyholds: *Clarke v. Danvers*, 1 Ch. Ca. 310; *Howe v. Howe*, 1 Vern. 415; *Anon.*, Freem. C. C. 123; *Benger v. Drew*, 1 P. Wms. 781; *Smith v. Baker*, 1 Atk. 385; *Withers v. Withers*, Amb. 151, *accord*.

The presumption of a resulting trust was held to be rebutted by the evidence in the following cases: *Gascoigne v. Thwing*, 1 Vern. 366; *Rundle v. Rundle*, 2 Vern. 252, 264; *Bellasis v. Compton*, 2 Vern. 294; *Maddison v. Andrew*, 1 Ves. 58; *Goodright v. Hodges*, *Watkins Copyholds* (4th ed.), 227; *Garrick v. Taylor*, 29 Beav. 79; 4 D., F. & J. 159; *Beecher v. Major*, 2 Dr. & Sm. 431. — Ed.

³ *Watkins Copyholds* (4th ed.), 216, s. c. — Ed.

thereby devised all his interest in these copyhold premises (amongst others) to the plaintiff, his younger son. The present bill stated these circumstances, and insisted that the whole purchase-money being paid by the father, although, by the form of the grant, the wife and the defendant had the legal interest in the premises for their lives in succession, yet, in a court of equity, they were but trustees for the father, and the bill, therefore, prayed that the plaintiff, as devisee of the father, might be quieted in the possession of the premises during the life of the defendant.

The defendant insisted that the insertion of his name in the grant operated as an advancement to him from his father to the extent of the legal interest thereby given to him. And this was the whole question in the cause.

This case was very fully argued by *Mr. Solicitor-General* and *Ainge*, for the plaintiff, and by *Burton* and *Morris*, for the defendant. The following cases were cited and very particularly commented on: *Smith v. Baker*; ¹ *Taylor v. Taylor*; ² *Mumma v. Mumma*; ³ *Howe v. Howe*; ⁴ *Anon.*; ⁵ *Benger v. Drew*; ⁶ *Dickenson v. Shaw*, before the Lords Commissioners in 1770; *Bedwell v. Froome*, before Sir T. Sewell, on the 10th May, 1778; *Row v. Bowden*, before Sir L. Kenyon, sitting for the Lord Chancellor; *Crispe v. Pratt*; ⁷ *Scroope v. Scroope*; ⁸ *Elliot v. Elliot*; ⁹ *Ebrand v. Dancer*; ¹⁰ *Kingdome v. Bridges*; ¹¹ *Back v. Andrews*; ¹² *Rundle v. Rundle*; ¹³ *Lamplugh v. Lamplugh*; ¹⁴ *Stileman v. Ashdown*; ¹⁵ *Pole v. Pole*.¹⁶

LORD CHIEF BARON, after directing the cause to stand over for a few days, delivered the judgment of the court.¹⁷

The question between the parties in this cause is, whether the defendant is to be considered as a trustee for his father in respect of his succession to the legal interest of the copyhold premises in question, and whether the plaintiff, as representative of the father, is now entitled to the benefit of that trust. I intimated my opinion of the question on the hearing of the cause, and I then, indeed, entertained very little doubt upon the rule of a court of equity, as applied to this subject; but as so many cases have been cited, some of which are not in print, we thought it convenient to take an opportunity of looking more fully into them, in order that the ground of our decision may be put in as clear a light as possible, especially in a case in which so great a dif-

¹ 1 Atk. 385.² 1 Atk. 386.³ 2 Vern. 19.⁴ 1 Vern. 415.⁵ 2 Freem. 123.⁶ 1 P. Wms. 781.⁷ Cro. Car. 548.⁸ 1 Ch. Cas. 27.⁹ 2 Ch. Cas. 231.¹⁰ 2 Ch. Cas. 26.¹¹ 2 Vern. 67.¹² 2 Vern. 120.¹³ 2 Vern. 264.¹⁴ 1 P. Wms. 111.¹⁵ 2 Atk. 430.¹⁶ 1 Ves. 76.¹⁷ Eyre, C. B., Hotham and Thompson, BB. — Ed.

ference of opinion seems to have prevailed at the bar. And I have met with a case in addition to those cited, which is that of *Rumbold v. Rumbold*, on the 20th April, 1761. The clear result of all the cases, without a single exception, is, that the trust of a legal estate, whether freehold, copyhold, or leasehold; whether taken in the names of the purchasers and others jointly, or in the name of others without that of the purchaser; whether in one name or several; whether jointly or *successivè*, — results to the man who advances the purchase-money. This is a general proposition supported by all the cases, and there is nothing to contradict it; and it goes on a strict analogy to the rule of the common law, that where a feoffment is made without consideration, the use results to the feoffor. It is the established doctrine of a court of equity, that this resulting trust may be rebutted by circumstances in evidence. The cases go one step further, and prove that the circumstance of one or more of the nominees being a child or children of the purchaser is to operate by rebutting the resulting trust; and it has been determined in so many cases that the nominee being a child shall have such operation as a circumstance of evidence, that we should be disturbing landmarks if we suffered either of these propositions to be called in question; namely, that such circumstance shall rebut the resulting trust, and that it shall do so as a circumstance of evidence. I think it would have been a more simple doctrine, if the children had been considered as purchasers for a valuable consideration. Natural love and affection raised a use at common law; surely, then, it will rebut a trust resulting to the father. This way of considering it would have shut out all the circumstances of evidence which have found their way into many of the cases, and would have prevented some very nice distinctions, and not very easy to be understood. Considering it as a circumstance of evidence, there must be, of course, evidence admitted on the other side. Thus, it was resolved into a question of intent, which was getting into a very wide sea, without very certain guides. In the most simple case of all, which is that of a father purchasing in the name of his son, it is said this shows that the father intended an advancement, and therefore the resulting trust is rebutted; but then a circumstance is added to this, namely, that the son happened to be provided for; then the question is, did the father intend to advance a son already provided for? Lord Nottingham could not get over this, and he ruled that, in such a case, the resulting trust was not rebutted; and in *Pole v. Pole*, in *Vesey*, Lord Hardwicke thought so too; and yet the rule in a court of equity, as recognized in other cases, is, that the father is the only judge as to the question of a son's provision; that distinction, therefore, of the son being provided for or not, is not very solidly taken or uniformly adhered to. It is then said that a purchase in the name of a son is a *prima facie* advancement (and, indeed,

it seems difficult to put it in any way) ; in some of the cases some circumstances have appeared which go pretty much against that presumption, as where the father has entered and kept possession, and taken the rents, or where he has surrendered or devised the estate ; or where the son has given receipts in the name of the father. The answer given is, that the father took the rents as guardian of his son. Now, would the court sustain a bill by the son against the father for these rents ? I should think it pretty difficult to succeed in such a bill. As to the surrender and devise, it is answered that these are subsequent acts ; whereas the intention of the father in taking the purchase in the son's name must be proved by concomitant acts ; yet these are pretty strong acts of ownership, and assert the right and coincide with the possession and enjoyment. As to the son's giving receipts in the name of the father, it is said that the son being under age, he could not give receipts in any other manner ; but I own this reasoning does not satisfy me.¹ In the more complicated cases, where the life of the son is one of the lives to take in succession, other distinctions are taken. If the custom of the manor be that the first taker might surrender the whole lease, that shall make the other lessees trustees for him ; but this custom operates on the legal estate, not on the equitable interest, and therefore this is not a very solid argument. When the lessees are to take *successivè*, it is said that, as the father cannot take the whole in his own name, but must insert other names in the lease, then the children shall be trustees for the father ; and to be sure, if the circumstance of a child being the nominee is not decisive the other way, there is a great deal of weight in this observation. There may be many prudential reasons for putting in the life of a child in preference to that of any other person ; and if in that case it is to be collected from circumstances whether an advancement was meant, it will be difficult to find such as will support that idea. To be sure, taking the estate in the name of the child, which the father might have taken in his own, affords a strong argument of such an intent ; but where the estate must necessarily be taken to him in succession, the inference is very different. These are the difficulties which occur from considering the purchase in the son's name as a circumstance of evidence only. Now, if it were once laid down that the son was to be taken as a purchaser for a valuable consideration, all these matters of presumption would be avoided.

It must be admitted that the case of *Dickinson v. Shaw* is a case very strong to support the plaintiff's claim. That came on in chancery on the 22d May, 1770. "A copyhold was granted to three lives to

¹ The presumption of an advancement was held to be rebutted by the father's possession and receipt of the profits of the land, in *Woodman v. Morrel*, Freem. C. C. 32. See *Stileman v. Ashdown*, 2 Atk. 477, 480. — Ed.

take in succession, — the father, son, and daughter ; the father paid the fine. There was no custom stated. The question was, whether the daughter and her husband were trustees during the life of the son, who survived the father. At the time of the purchase the son was nine and the daughter seven years old. It appeared that the father had leased the premises from three years to three years, to the extent of nine years. On this case, Lords Commissioners Smythe and Aston were of opinion that, as the father had paid the purchase-money, the children were trustees for him." To the note I have of this case it is added that this determination was contrary to the general opinion of the bar, and also to a case of *Taylor v. Alston* in this court. In *Dickinson v. Shaw* there was some little evidence to assist the idea of its being a trust ; namely, that of the leases made by the father. If that made an ingredient in the determination, then that case is not quite in point to the present ; but I rather think that the meaning of the court was that the burthen of proof lay on the child, and that the cases which went the other way were only those in which the estate was entirely purchased in the name of the children. If so, they certainly were not quite correct in that idea, for there had been cases in which the estates had been taken in the names of the father and son. I have been favored with a note of *Rumbold v. Rumbold*, before Lord Keeper Henley, on the 20th April, 1761, where a copyhold was taken for three lives in succession, — the father and two sons. The father paid the fine, and the custom was, that the first taker might dispose of the whole estate (and his Lordship then stated that case fully). Now this case does not amount to more than an opinion of Lord Keeper Henley ; but he agreed with me in considering a child as a purchaser for good consideration of an estate bought by the father in his name, though a trust would result as against a stranger. It has been supposed that the case of *Taylor v. Alston* in this court denied the authority of *Dickinson v. Shaw*. That cause was heard before Lord Chief Baron Smythe, myself, and Mr. Baron Burland, and was the case of an uncle purchasing in the names of himself and nephew and a niece ; it was decided in favor of the nephew and niece, not on any general idea of their taking as relations, but on the result of much parol evidence, which was admitted on both sides, and the equity on the side of the nominees was thought to preponderate. Lord Kenyon was in that cause, and his argument went solely on the weight of the parol evidence ; indeed, as far as the circumstance of the custom of the first taker's right to surrender, it was a strong case in favor of a trust ; however, the court determined the other way on the parol evidence : that case, therefore, is not material. Another case has been mentioned which is not in print, and which was thought to be materially applicable to this, *Bedwell v. Froome*, before Sir T. Sewell ; but that was materially distin-

guishable from the present: as far as the general doctrine went, it went against the opinion of the Lords Commissioners. His Honor there held that the copyholds were part of the testator's personal estate, for that was not a purchase in the name of the daughter; she was not to have the legal estate; it was only a contract to add the daughter's life in a new lease to be granted to the father himself. There could be no question about her being a trustee, for it was as a freehold in him for his daughter's life; but in the course of the argument his Honor stated the common principles as applied to the present case, and ended by saying that, as between father and child, the natural presumption was that a provision was meant. The anonymous case in 2 Freem. corresponds very much with the doctrine laid down by Sir T. Sewell; and it observes, that an advancement to a child is considered as done for valuable consideration, not only against the father, but against creditors. *Kingdome v. Bridges* is a strong case to this point; that is, the valuable nature of the consideration arising on a provision made for a wife or for a child: for there the question arose as against creditors.

I do not find that there are in print more than three cases which respect copyholds, where the grant is to take *successivè*. *Rundle v. Rundle*,¹ which was a case perfectly clear; *Benger v. Drew*,² where the purchase was made partly with the wife's money; and *Smith v. Baker*,³ where the general doctrine as applied to strangers was recognized; but the case turned on the question whether the interest was well devised. Therefore, as far as respects this particular case, *Dickinson v. Shaw* is the only case quite in point; and then the question is whether that case is to be abided by? With great reverence to the memory of those two judges who decided it, we think that case cannot be followed; that it has not stood the test of time or the opinion of learned men; and Lord Kenyon has certainly intimated his opinion against it. On examination of its principles, they seem to rest on too narrow a foundation; namely, that the inference of a provision being intended did not arise, because the purchase could not have been taken wholly in the name of the purchaser. This, we think, is not sufficient to turn the presumption against the child. If it is meant to be trust, the purchaser must show that intention by a declaration of trust; and we do not think it right to doubt whether an estate in succession is to be considered as an advancement, when a moiety of an estate in possession certainly would be so. If we were to enter into all the reasons that might possibly influence the mind of the purchaser, many might, perhaps, occur in every case upon which it might be argued that an advancement was not intended. And I own it is not a very prudent conduct for a man just married to tie up his property for one child, and preclude himself from providing for the rest of his family; but this applies

¹ 2 Vern. 364.² 1 P. Wms. 781.³ 1 Atk. 385.

equally in case of a purchase in the name of the child only ; yet that case is admitted to be an advancement ; indeed, if anything, the latter case is rather the strongest, for there it must be confined to one child only. We think, therefore, that these reasons partake of too great a degree of refinement, and should not prevail against a rule of property which is so well established as to become a landmark, and which, whether right or wrong, should be carried throughout.

This bill must, therefore, be dismissed ; but after stating that the only case in point on the subject is against our present opinion, it certainly will be proper to dismiss it without costs.¹

WRAY v. STEELE.

IN CHANCERY, BEFORE SIR THOMAS PLUMER, V. C., MARCH 8, 1814.

[Reported in 2 Vesey & Beames, 388.]

THE bill prayed that the defendant Picker may set forth his claim in respect of the third undivided part of an estate, conveyed by indentures of lease and release to the use of Thomas Mackeness, deceased, in fee ; and that a commission may issue to make partition.

The answer, claiming one-third of the said third part, alleged that, at the time of the purchase of the estate by Mackeness and Steele, it was agreed between Mackeness and Picker, that Picker should be jointly interested with Mackeness in the purchase ; and that they

¹ Finch v. Finch, 15 Ves. 43 ; Murless v. Franklin, 1 Swan. 13 ; Skeats v. Skeats, 2 Y. & C. C. C. 9 ; Christy v. Courtenay, 13 Beav. 96 ; Jeans v. Cooke, 24 Beav. 513 ; Williams v. Williams, 32 Beav. 370, *accord*.

In Finch v. Finch, *supra*, Lord Eldon said, p. 50 : “ I remember the case of Dyer v. Dyer, which was very fully considered ; and the court meant to establish this principle, viz., admitting the clear rule that, where A. purchases in the name of B., A. paying the consideration, B. is a trustee ; notwithstanding the Statute of Frauds, that rule does not obtain where the purchase is in the name of a son, — that purchase is an advancement *prima facie* ; and in this sense, that this principle of law and presumption is not to be frittered away by nice refinements.”

The presumption of advancement applies to personal property as well as to real property. Holt v. Frederick, 2 P. Wms. 356 ; Benbow v. Townsend, 1 M. & K. 506 ; Sidmouth v. Sidmouth, 2 Beav. 447.

The presumption of an advancement would seem naturally to arise in favor of any nominal purchaser towards whom the real purchaser stands *in loco parentis* ; the presumption has, accordingly, been held to exist under such circumstances in favor of a nephew (Currant v. Jago, 1 Coll. 261) ; a grandchild (Ebrand v. Dancer, 2 Ch. Ca. 26 ; see Lloyd v. Read, 1 P. Wms. 607) ; an illegitimate child (Beckford v. Beckford, Loftt, 490 ; Soar v. Foster, 4 K. & J. 152 ; see also Kilpin v. Kilpin, 1 M. & K. 520 ; Pym v. Lookyer, 5 M. & Cr. 29) ; but not in favor of an illegitimate grandchild (Tucker v. Burrow, 2 Hem. & M. 515). — ED.

should pay their respective proportions of the purchase-money; and accordingly Picker paid to Mackeness £2,189 11s. 10d. in part of his proportion previously to the completion of the purchase; and Mackeness advanced for Picker £1,783 14s. 10d., the amount of the residue of Picker's proportion; who afterwards paid £400 in part payment of that advance; and paid interest on the residue to Mackeness's death, receiving from Mackeness one-third of his proportion of the rents during the same period; and as evidence the defendant produced an account in the handwriting of Mackeness.

Mr. Boteler, for the plaintiffs; *Mr. Bell*, for the defendant Picker; *Mr. F. Cross*, for the other defendants.

In the course of the argument, the following authorities were referred to: *Gascoigne v. Thwing*; ¹ *Anonymous Case*; *Dyer v. Dyer*; *Crop v. Norton*; ² and *Lake v. Craddock*. ³

THE VICE-CHANCELLOR. The question is, whether there is a resulting trust for Picker under the circumstances of this case. The doubt arises from what Lord Hardwicke is represented to say in the case of *Crop v. Norton*, which is reported rather differently in *Atkyns* and in the *Modern Reports*.

The rule was clearly settled by the decision in *2 Ventris*, 361, in the 35th of Charles the Second, about six years after the Statute of Frauds passed, that where one man advances the money to purchase an estate, but the purchase is made in the name of another, a trust arises for him who paid the money, — that case forming an exception to the Statute of Frauds; and so long has that decision been followed, that no rule can be represented as more clear and incontrovertible. In *Dyer v. Dyer* Lord Chief Justice Eyre states the same doctrine. It is said, however, that the case has never yet occurred of a joint advance, and that in *Crop v. Norton* the application of this rule is confined to an advance by one individual. As that case appears reported, there is a color given to this argument; but the doctrine laid down by Lord Hardwicke must be understood with relation to the case before him, not generally; and the case appears to have been decided on another ground, that there was a deed-poll executed the day after, constituting a part of the transaction, — a plain declaration of the trusts in writing by the person having the legal estate. That was a mixed case: the consideration consisting not merely of money, but also of the surrender of the old lease; and it was decided on the particular facts, not on the general principle. Lord Hardwicke could not have used the language ascribed to him. What is there applicable to an advance by a single individual that is not equally applicable to a joint advance under similar circumstances? On these grounds I think the defendant Picker is entitled, if

¹ 1 Vern. 366.

² 2 Atk. 74; 9 Mod. 233.

³ 3 P. Wms. 158.

the fact of his having advanced part of the purchase-money can be made out; and as to that there must be an inquiry.¹

STOCK v. McAVOY.

IN CHANCERY, BEFORE SIR JOHN WICKENS, V. C., NOVEMBER 18, 1872.

[*Reported in Law Reports, 15 Equity, 55.*]

ON the 9th of November, 1860, Philip McAvoy, the testator, purchased with his own moneys a copyhold cottage, called Rose Cottage, near Woodford Bridge. The testator's son, Thomas McAvoy, was by his direction admitted tenant on the court roll, but the father paid the fine, £15, and £2 13s. 4d. quit-rent. He had previously been living at Chigwell, and was in want of a residence. He shortly afterwards called on the then tenant of the cottage, a Mrs. Sutton, and gave her notice to quit, at which she was very much distressed. A few days afterwards, she called on the testator, and informed him that she was unable to find any other residence, and seemed so much affected at leaving the house, that the testator consented to allow her to remain at a rent of £18 instead of £12, which she had previously paid. The testator always received the rents and applied them to his own use, and the receipts were generally, but not invariably, made out in the name of the son. The testator always paid the quit-rent and the cost of the repairs of the cottage out of his own moneys, and always treated the cottage as his own property. The testator died on the 2d of August, having by his will directed his wife and his son Thomas McAvoy, whom he appointed executrix and executor of his will, to convert into money his estate (other than his freehold, copyhold, and leasehold estate), and to invest the same, and to pay the produce of the fund and of his real estates to

¹ Powell v. Monson Co., 3 Mas. 347, 364; Case v. Coddington, 38 Cal. 191; Barrows v. Bohan, 41 Conn. 278; Bruce v. Roney, 18 Ill. 67; Smith v. Smith, 85 Ill. 189; McDonald v. McDonald, 24 Ind. 68; Stark v. Cannady, 3 Litt. 399; Letcher v. Letcher, 4 J. J. Marsh. 590; Brothers v. Porter, 6 B. Mon. 106; Honore v. Hutchings, 8 Bush, 687; Buck v. Swazey, 35 Me. 41; Root v. Blake, 14 Pick. 271; Baumgartner v. Guessfeld, 38 Mo. 36; Frederick v. Haas, 5 Nev. 389; Tebbits v. Tilton, 31 N. H. 283; Hall v. Young, 37 N. H. 134; Hopkinson v. Dumas, 42 N. H. 296; Ross v. Hegeman, 2 Edw. 373; Botsford v. Burr, 2 Johns. Ch. 405; Union College v. Wheeler, 59 Barb. 585; 5 Lans. 160, s. c.; Keaton v. Cobb, 1 Dev. Eq. 439; Reynolds v. Morris, 17 Ohio St. 510; Morey v. Herrick, 18 Pa. 123, 129; Clark v. Clark, 43 Vt. 685; Pumphry v. Brown, 5 W. Va. 107, *accord*.

In Hill v. Hill, 8 Ir. R. Eq. 140, 622, where the tenant of a particular estate and the remainder-man holding under a lease for lives surrendered their lease and took a new one for lives to themselves and their heirs as joint tenants, it was decided that there was a resulting trust according to their interests under the original lease. — Ed.

his widow for life, remainder to his son for life, remainder to his son's wife for life, and then to hold the same on trust for the children of his son Philip. The will was duly proved. The testator died in 1870, and a bill was afterwards filed to administer his estate, and on the 23d of July, 1870, an administration decree was made, with an inquiry, *inter alia*, of what freehold, copyhold, and leasehold estate the testator died possessed of. Shortly after the bill was filed, Thomas, the son, died, having devised his real estate to his widow. The Chief Clerk, by his certificate, dated the 5th of May, 1871, found that Rose Cottage, let to a Mrs. Sutton, formed part of the testator's estate; but added a note that it was claimed by the widow of the son Thomas, who was the devisee.

The widow of Thomas took out a summons to vary the Chief Clerk's certificate, and the matter now came before the court on that summons, and on further consideration.

In addition to the facts above stated, there was a great deal of evidence as to the declarations by the testator. The son's widow stated that she had heard testator tell his son that he was to consider Rose Cottage his own on testator's death, and that he, testator, had bought it for him, and intended it for the son's benefit after testator's death; that the son was admitted tenant to save the expense of a fine; that she well recollected testator, two or three days before his death, saying to Thomas, when he was talking of his affairs, "There is that Rose Cottage, my boy, I wish you to take the rent of that directly: no one can dispute your right to that."

The testator's widow stated that the son Thomas was admitted tenant to save the expenses of a fine, as he would probably outlive his father and mother. On one occasion she remembered testator saying, "You are a young man, Tom, and we are old; so I will take it (the cottage) up in your name, and that will save money when we are gone." Several other witnesses gave evidence of declarations by the testator that he purchased the cottage for his son.

Mr. Colt, for the summons. This case is well within the authorities. In *Dyer v. Dyer* copyholds were purchased by the father, and were granted by the lord to the father, his wife, and younger son, in succession. The father paid all the purchase-money, enjoyed the property for his life, and then by his will devised to another son. The devisees of the father filed a bill, alleging that there was a resulting trust to the testator, but the court held that the transaction was advancement.

This is almost exactly the present case. It is impossible to suggest any reason why the son should have been admitted tenant, except for his own benefit. In *Finch v. Finch*,¹ Lord Eldon said that *Dyer v. Dyer* was fully considered, and was intended to settle the law, "and that the

¹ 15 Ves. 43-50.

principle of law and presumption was not to be frittered away by nice refinements."

Then it was said that, the father having received the rents, the presumed advancement must be held to be rebutted; but that was not the doctrine of this court. *Taylor v. Taylor*.¹ So in *Grey v. Grey*, the father was the owner of the money, received the profits for twenty years, granted leases, took fines, enclosed and built on the land, gave directions for selling it, treated for the sale, but yet it was held an advancement. *Murless v. Franklin*² was to the same effect. On these authorities it is clear that *Rose Cottage* is the property of the son's devisee.

Mr. W. Pearson and *Mr. Maidlow* opposed the summons. Either this is an advancement or it is not, as there can be no intermediate case. If it is not an advancement, there must be a resulting trust for the purchaser.

But whatever might be the ultimate intention, if any prior interest was reserved for the life of the purchaser, it is not an advancement within the rule. *Dumper v. Dumper*; ³ *Bone v. Pollard*; ⁴ *Williams v. Williams*.⁵ The only admissible evidence must be contemporaneous.

The decisions show that evidence of the purchaser's intention must be contemporaneous with the purchase. *Murless v. Franklin*.⁶ Here all the admissible evidence shows that the intention was that the father was to have a prior life-estate, and therefore there is no advancement.

Secondly, the evidence clearly shows that in this case the testator retained possession so ostensibly as to get rid of the difficulty to be found in some of the cases. This of itself shows that there was no advancement.

Mr. Colt, in reply. *Bone v. Pollard* is no authority on the question of advancement, the father, in that case, having become incapable of superintending his business (that of a farmer), and the capital was consequently transferred into the daughters' names jointly. All the facts negated the idea of any advancement. *Williams v. Williams* is really an authority in the son's favor, for it shows that the receipt of rents by the father does not rebut the presumed advancement.

SIR JOHN WICKENS, V. C. Where a father purchases property in the name of his son, without making any formal declaration of trust, it is either a gift to his son absolutely or he is a trustee for his father. If the son is a trustee at all, he is wholly a trustee; but the strong presumption of law is that he is not a trustee at all; and it can only be displaced by evidence. In this case the father and son are both dead, and the admissible evidence consists of contemporaneous statements

¹ 1 Atk. 336.

² 1 Sw. 13.

³ 3 Giff. 583.

⁴ 24 Beav. 283.

⁵ 32 Beav. 370, 375.

⁶ 1 Sw. 13.

and acts, and of subsequent statements of either of them against the interest of the party making them.

It is said that the taking possession by the father at the time of the purchase is insufficient in general to rebut the presumption; but this does not, I conceive, apply where there is a formal and unmistakable act of taking possession. Suppose a man bought a shop in his son's name, and immediately took possession and put his own name over the door, that would be an ostensible taking possession sufficient to show ownership in the father and trusteeship in the son.

In this case the father called on the tenant, and gave notice to quit, but ultimately allowed her to remain. Perhaps I am not justified in treating that circumstance as a formal and unmistakable act of taking possession by the father, sufficient to establish that he purchased for himself. But it is a circumstance of great weight, and looking at this and the rest of the evidence, I am of opinion that the Chief Clerk was right in finding that this was a trust and not an advancement. There must be a declaration that the son was a trustee for the father. The costs of the summons to be costs in the cause.¹

In re EYKYN'S TRUSTS.

IN THE HIGH COURT OF JUSTICE, CHANCERY DIVISION, BEFORE SIR
RICHARD MALINS, V. C., JUNE 15, 1877.

[*Reported in 6 Chancery Division, 115.*]

THIS was a petition by Georgina Charlotte Eykyn, which stated that in July, 1851, John Eykyn, the husband of the petitioner, invested a sum of £4,000 in the purchase of debentures in the Greenwich Railway Company, in the names of himself, John Eykyn, his wife, and Joseph Greenhill, and about the same time he also purchased sixty shares of £20 each in the same company, which were transferred into the names of John Eykyn, his wife, Thomas Eykyn, and Joseph Greenhill. The interest upon the debentures and shares was received by John Eykyn during his life. By an indenture of settlement made on the marriage

¹ The presumption of advancement was held to be rebutted by the evidence in the following cases: *Swift v. Davis*, 8 East, 354, n.; *Prankerd v. Prankerd*, 1 S. & S. 1; *Collinson v. Collinson*, 3 D., M. & G. 409; *Dumper v. Dumper*, 3 Giff. 583; *Williams v. Williams*, 32 Beav. 370. And also in *Scawin v. Scawin*, 1 Y. & C. C. C. 65; *Bone v. Pollard*, 24 Beav. 283; *Re De Visme*, 12 W. R. 140 (conf. 2 P. Wms. 356); *Forrest v. Forrest*, 13 W. R. 380; 34 L. J. Ch. 428, s. c., where the subject of the purchase was personal property. See also *Rumboll v. Rumboll*, 2 Ed. 15. — Ed.

of John Eykyn with the petitioner, dated the 20th of September, 1874, certain shares in public companies had been transferred to the trustees, Joseph Greenhill, Thomas Eykyn, and John Holderness, upon trust to pay the dividends and interest to the petitioner for life, and afterwards upon trust for John Eykyn for his life, with remainder to the children of the marriage. The petitioner believed that the debentures in the Greenwich Railway were intended by John Eykyn to be an addition to the settlement funds, and to be held upon the trusts thereof, and that the shares in the railway were intended by him to be the absolute property of the petitioner. John Eykyn made his will on the 23d of September, 1851, and thereby appointed the petitioner and Joseph Greenhill, and his brothers William and Thomas Eykyn, executors thereof, and he devised and bequeathed his real and personal estate to his executrix and executors in trust for the benefit of his wife for life, and afterwards for his children then living, and in default of issue for the benefit of his, the testator's, brothers and sisters and their issue living at the death of his wife.

John Eykyn died in September, 1858, and there was issue of the marriage one child only, namely, John Henry Eykyn, who attained the age of twenty-one in June, 1869.

In February, 1877, the debentures and shares were sold, and the produce was paid into court under the Trustees Relief Act. Up to that time the interest and dividends had been paid to and received by the petitioner.

The petition prayed that it might be declared to whom the produce of the debentures and shares belonged.

J. Pearson, Q. C., and Freeman, for the petitioner, the widow of John Eykyn. We submit that the two investments made by Mr. Eykyn of £4,000 railway debentures and sixty shares in the Greenwich Railway were intended as an advancement for the wife. The railway debentures were placed in the names of Mr. Eykyn and his wife and one of the trustees of his settlement. It is supposed by Mrs. Eykyn that this investment was intended as an augmentation of the fund included in the settlement upon her marriage on account of some portion of that fund having become reduced in amount; but there is no evidence of such being the husband's intention, and in opposition to this view there is the fact that only one of the trustees of the settlement was chosen as a transferee of the fund. The probability, therefore, is that an advancement for the wife absolutely was intended, and not an augmentation of the settlement fund. But under any circumstances it could not have been intended to form part of the general estate of Mr. Eykyn, or he would have added the names of the same persons whom he appointed trustees of his will. The second investment was in the names of Mr. Eykyn himself and of his wife and two trustees of his settlement. This

falls within the same observation, and both funds must be considered as advancements for the wife.

Everitt, for the only son of Mr. and Mrs. Eykyn, took no part in the argument, being content to leave the question to be decided by the court.

Glasse, Q. C., and *Millar*, for persons claiming under the will of J. Eykyn. There is no case deciding that where a fund is transferred into the names of a husband and wife and a stranger, the wife is to take the fund absolutely upon her surviving her husband. On the contrary, there are cases deciding that where a fund is transferred into the name of a wife it is intended only for convenience that the wife may be able to draw upon the fund, but it could not have been intended that she should have more than a life interest in the money, and in that case the residue after her death will fall into the general estate of Mr. Eykyn, and will pass by his will. In support of this view of the case we have *Marshal v. Crutwell*; ¹ *Lloyd v. Pughe*; ² *Fowkes v. Pascoe*; ³ *Dummer v. Pitcher*.⁴

MALINS, V. C. This case is peculiar in this respect, that it is the first case in which similar circumstances have occurred. Transactions of this kind have often taken place where a person has invested money in the names of himself and his wife, but the introduction of the name of a stranger has never, I believe, been brought in question before the courts. It does not appear what reason Mr. Eykyn had for making these particular investments. The original amount comprised in his marriage settlement produced a sum of £600 per annum, and that amount having been reduced by about £150, Mrs. Eykyn believed that one of the investments was intended to augment the settlement fund and raise it to the original amount. Whether that was his intention or not there is no evidence of anything said or done by J. Eykyn to establish the belief entertained by Mrs. Eykyn, and the case must be decided independently of any evidence of intention.

It appears, then, that the railway debentures which were first purchased were placed in the names of J. Eykyn, his wife, and Joseph Greenhill, who was also one of the trustees of the settlement, and the sixty shares subsequently purchased were transferred into the names of J. Eykyn and his wife, and Thomas Eykyn and Joseph Greenhill, the two last being both trustees of the settlement. These transactions took place in 1851, and no question was raised about them till very recently. Now, the question arises whether the property so purchased is to be considered as part of the general estate of J. Eykyn, or whether it belongs to Mrs. Eykyn, the petitioner, or whether it is to be held to

¹ Law Rep. 20 Eq. 328.

² Law Rep. 14 Eq. 241; reversed on appeal, Law Rep. 8 Ch. 88.

³ Law Rep. 10 Ch. 343.

⁴ 2 My. & K. 262.

form part of the trust funds settled upon the marriage of Mr. and Mrs. Eykyn. If the funds formed part of the general estate, then they passed by the will of J. Eykyn to Mrs. Eykyn as tenant for life, and afterwards to her son, if he shall be then living, and if he shall be then dead without issue it is to go over to collateral relatives who are respondents to this petition.

I am now called upon to decide the effect of the transactions *per se*, there being no evidence of anything said or done which can prove anything one way or the other. The law of this court is perfectly settled that when a husband transfers money or other property into the name of his wife only, then the presumption is, that it is intended as a gift or advancement to the wife absolutely at once, subject to such marital control as he may exercise. And if a husband invests money, stock, or otherwise, in the names of himself and his wife, then also it is an advancement for the benefit of the wife absolutely if she survives her husband; but if he survives her, then it reverts to him as joint tenant with his wife. This principle is established by the authority of *Dummer v. Pitcher*,¹ and cannot now be disputed. Therefore, if this stock had been put into the name of Mrs. Eykyn alone, the result would have been that the law would presume that an advancement or provision for the wife was the object of the husband, unless there was evidence to rebut the presumption.

But what are the facts? As regards the \$4,000 of debentures they were put in the names of three persons, — Mr. Eykyn himself, his wife, and Joseph Greenhill. In those names the stock remained up to the time when it was sold in order to be paid into court. Now, what is the position of Joseph Greenhill? He paid nothing in respect of this investment, and he must necessarily be a trustee for some one. Was he, then, trustee for Mrs. Eykyn or Mr. Eykyn?

I confess, on principle, it seems to me when a man transfers money into the name of his wife, that must be intended as an advancement, and not less so because he places it in the name also of another person. I think the wife becomes absolutely entitled, and the other person must be intended as a trustee for her. What was the object of this transaction? J. Eykyn made his will in September, 1851, and he does not place the stock in the names of the persons whom he appointed executors, as he might have been expected to do if he intended it to form part of his general estate, but he inserts the name of Joseph Greenhill only. I can only say that I think what he intended must have been this: "I do not want this to go to my wife if she should die in my lifetime; but if I die first, then I will put in another name, because Joseph Greenhill in that case will hold the stock as trustee for her; or if I should survive my wife, then he will be a trustee for me."

¹ 2 My. & K. 262.

What other object could he have had? Mrs. Eykyn is under the belief that this investment was intended as an augmentation of the fund comprised in the settlement, because that fund had been reduced to a less amount than it originally produced, and this was intended to make the settlement fund up to what it was at first; but the court must look at the nature of the transaction in the absence of any evidence to explain what was the intention of Mr. Eykyn, and must treat it as independent of any evidence. Then, in my opinion, the object was to augment the means that the widow was to have if she survived her husband.

Although the question is open to this observation, that it has never yet been decided that where money is transferred into the names of the wife and another person, it is an advancement, still, on the other hand, there is no decision to the contrary, there being in fact no judicial decision whatever upon the subject. In my opinion, there is no difference whether it is in the name of the husband and wife, or the husband, the wife, and a third person, except that the third person must be a trustee for the survivor. Therefore, in this case, the wife being the survivor, Mr. Greenhill is a trustee for her. In other words, it is in the nature of an advancement for the wife.

On another ground, I think, it could not have been intended as an augmentation of the settlement fund, because it must have been perfectly well known to Mr. Eykyn who were the trustees of his settlement, and if it had been his intention to augment that fund he would have introduced the names of the three gentlemen who were the trustees of the settlement.

Then with regard to the sixty shares in the railway, they were transferred into the names of Mr. Eykyn and his wife and of Thomas Eykyn and Joseph Greenhill, and these gentlemen were two of the three trustees of the settlement. Mr. Eykyn, of course, knew that Mr. Holderness was also one of the trustees of the settlement, and if he had intended to augment the settlement fund he would in that case have introduced the names of all three trustees, therefore I think with regard to this investment it stands in the same position as the £4,000 debentures, and was an advancement or additional provision for the widow; and the two gentlemen, Mr. Thomas Eykyn and Mr. Greenhill, were to be trustees for her if she survived. As to this investment, the petitioner does not say she believes that it was intended as an augmentation of the settlement fund, but as a provision for herself; but in my opinion both cases rest upon the same principle, and whether money is placed in the names of a husband and wife only, or whether third persons are added, it makes no difference, except that the third persons are trustees for the survivor, and it is just the same as if it stood in the name of the wife only.

The old doctrine of the courts of law was that where a man trans-

ferred a fund into the names of himself, his wife, and a third person, all three were joint tenants of the fund, but if the third person is a stranger, and is a person who has not contributed towards the investment, then if he survives the one who is capable of taking by way of advancement, he would, in the eyes of this court, have no interest, because he would be incapable of taking. That doctrine would equally apply to both these cases.

I think, on the whole, it is clear that Mr. Eykyn had no object in these transactions except that of making an extra provision for his widow.

Then as to the authorities. The transactions in the case of *Marshall v. Crutwell*¹ were of a totally different nature. There the husband, who was in failing health, transferred his banking account into the names of himself and his wife for the purpose of enabling his wife to draw cheques and to manage his affairs when he was incapable of doing so himself; and the Master of the Rolls came to the conclusion that it was merely done as a mode of conveniently managing the husband's affairs. The case of *Fowkes v. Pascoe*² went to the whole length of what I am now deciding.

*Lloyd v. Pughe*³ was a case differing entirely from the present, because there the wife was executrix of her father, and paid the money she received as such executrix into an account in her own name. The property belonged to the wife, and the husband paid money of his own to the same account, which was not paid by way of advancement, but for convenience. There was nothing in that case to interfere with what I am deciding in this case, which is upon the broad principle that a transaction of this kind, where there is no evidence to explain what the intention was, must be taken to be for the benefit of the wife, whether the money is placed in the names of the husband and wife, or in the names of the husband and wife and a stranger, in which case the stranger becomes a trustee for the wife upon her surviving the husband.

The decree must therefore be, — the court being of opinion that the two sums so invested were not intended as an augmentation of the settlement fund, but as an advancement for the benefit of the wife, let the amount be paid over to her.⁴

¹ L. R. 20 Eq. 328.

² L. R. 10 Ch. 343.

³ L. R. 14 Eq. 341; L. R. 8 Ch. 88.

⁴ *Kingdon v. Bridges*, 2 Vern. 67; *Christ's Hospital v. Budgin*, 2 Vern. 683; *Lucas v. Lucas*, 1 Atk. 270; *Glaister v. Hewer*, 8 Ves. 195, 199 (*semble*); *Coates v. Strevens*, 1 Y. & Coll. 72, *accord*. See also *Dummer v. Pitcher*, 2 M. & K. 262.

In *Hoyes v. Kindersley*, 2 Sm. & G. 195, the evidence was held to rebut the presumption of an advancement. See also *Lloyd v. Pughe*, L. R. 8 Ch. Ap. 88, reversing s. c. L. R. 14 Eq. 241; *Marshall v. Crutwell*, L. R. 20 Eq. 328.

The presumption does not arise in favor of a woman not legally married: *Rider v. Kidder*, 10 Ves. 360; *Snar v. Foster*, 4 K. & J. 152. — Ed.

MICHAEL J. MCGOWAN AND OTHERS v. JAMES MCGOWAN
AND WIFE.IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, NOVEMBER
SESSION, 1859.*[Reported in 14 Gray, 119.]*

ACTION of contract, by the heirs of John McGowan, praying for relief in equity, to enforce a resulting trust. The plaintiff alleged that on the 15th of December, 1851, John McGowan purchased certain real estate of Duncan McKendrick; that "the consideration paid was three hundred and twenty dollars, and also twenty-four dollars more agreed at the time to be paid and paid by said John to McKendrick; that said John did not take the deed in his own name, but had it conveyed from said McKendrick to said John's brother, James McGowan, who took the said property in trust to hold the same to the use of said John and his heirs and assigns, though it did not appear in the deed that said James took said property in trust as aforesaid, but the deed showed an absolute conveyance to said James in fee;" that on the 19th of said December said James, at John's request, made a note for \$320, secured by mortgage of the premises, to Samuel B. King of Taunton, payable in five years, with interest annually; "that at the time of the purchase of the property, and at the time of said mortgage, it was agreed and understood by James and John that said John was to proceed and erect a dwelling-house on said premises, and whatever other buildings he chose for his residence, and that said James should hold the same in trust for said John as aforesaid;" that John, within two years, proceeded to erect a dwelling-house on the premises at an expense of \$1,100, and from the time of the completion of the house until his death in June, 1858, occupied the premises with his family, and leased a part of the house and received the rents to his own use, and "also paid the annual interest on said mortgage to King as aforesaid, furnishing his brother James with the money for that purpose;" that on the 7th of June, 1852, James conveyed most of his real estate, including this land, with notice of the trust, to his brother Patrick, who, on the next day, conveyed the same to Catharine McGowan, wife of James, with like notice; that Catharine and James, at the request of John, made a note of \$400 and interest, secured by mortgage on the premises, to Abiathar K. Williams, in payment for lumber furnished by him and used in building the dwelling-house; that John regularly paid the interest on this note during his lifetime, and that all the labor and materials for the house were furnished at John's request and charge,

and paid for by him ; “ and the said James and Catharine and Patrick never, during the lifetime of said John, paid from their or either of their own proper funds, any part or portion of the interest on said mortgage, or of the sums expended for the labor and materials aforesaid ; nor did they expend anything except moneys furnished by said John ; and during the lifetime of said John, by their acts and admissions, always acknowledged that they held said premises upon the trust aforesaid, to wit, as trustee and trustees of said John McGowan ; but that since the decease of said John, said Catharine claims and pretends that the whole of said property belongs to her absolutely, and that she does not hold it in trust as aforesaid ; and she and her said husband threatened and have attempted to eject the plaintiffs from said premises, and do claim to receive the rents and profits of the premises, and have received a portion of them.”

The defendants demurred generally.

B. Sanford, for the defendants.

J. Brown, for the plaintiffs.

HOAR, J. The plaintiffs seek, by their bill, to enforce the execution of a resulting trust. The case made by the bill is undoubtedly one of considerable hardship ; but we are unable, upon careful examination, to perceive that it admits of any relief from a court of equity, consistently with a due regard to the well-settled principles of law. The whole consideration for the purchase of the estate was three hundred and forty-four dollars, of which three hundred and twenty dollars was paid by the note of James McGowan, under whom the defendants claim, and to whom the conveyance was made ; and twenty-four dollars agreed to be paid in labor by John McGowan, the father of the plaintiffs, which was afterwards paid by him. The subsequent transactions between the parties, and the improvements made upon the estate, being all proved by parol evidence, and proceeding from contracts not in writing, do not change their original relation to the title.

There is no doubt of the correctness of the doctrine, that where the purchase-money is paid by one person, and the conveyance taken by another, there is a resulting trust created by implication of law in favor of the former. And where a part of the purchase-money is paid by one, and the whole title is taken by the other, a resulting trust *pro tanto* may in like manner, under some circumstances, be created.

But in the latter case we believe it to be well settled that the part of the purchase-money paid by him in whose favor the resulting trust is sought to be enforced, must be shown to have been paid for some specific part, or distinct interest in the estate ; for “ some aliquot part,” as it is sometimes expressed ; that is, for a specific share, as a tenancy in common or joint tenancy of one half, one quarter, or other particular fraction of the whole ; or for a particular interest, as a life

estate, or tenancy for years, or remainder, in the whole; and that a general contribution of a sum of money toward the entire purchase is not sufficient. *Crop v. Norton*; ¹ *Sayre v. Townsends*; ² *White v. Carpenter*; ³ *Perry v. McHenry*; ⁴ *Baker v. Vining*.⁵

The case of *Jenkins v. Eldredge*,⁶ might be considered a conflicting authority; but, beside the question how far the doctrines of that case can be reconciled with the general current of decisions in this commonwealth, the ground upon which Mr. Justice Story proceeded with the most confidence in his elaborate judgment in that cause seems undoubtedly to have been, that the agreement of Eldredge to make and preserve as evidence a written declaration of trust which he afterwards neglected and refused to make, would constitute a case of constructive fraud, against which equity would relieve.

In the case at bar, there is no allegation that any division of the property was contemplated by the parties; or that the work done by John McGowan in part payment for the conveyance was intended as anything but a small contribution toward the entire purchase.

*Demurrer sustained and bill dismissed.*⁷

ELLEN E. McDONOUGH v. JAMES O'NIEL.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, SEPTEMBER TERM, 1873.

[*Reported in 113 Massachusetts Reports, 92.*]

BILL in equity by the widow, being the administratrix with the will annexed and the sole legatee of John B. McDonough, to enforce a resulting trust.⁸

GRAY, C. J. The decision of this case depends upon the application to the evidence of well-settled rules of equity jurisprudence.

Where land conveyed by one person to another is paid for with the money of a third, a trust results to the latter, which is not within the

¹ 2 Atk. 74.

² 15 Wend. 647.

³ 2 Paige, 217.

⁴ 13 Ill. 227.

⁵ 30 Maine, 121.

⁶ 3 Story, 181.

⁷ *Olcott v. Bynum*, 17 Wall. 44; *Robles v. Clarke*, 25 Cal. 317 (*semble*); *Perry v. McHenry*, 13 Ill. 227 (*semble*); (see *Fleming v. Hale*, 47 Ill. 282); *Buck v. Warren*, 14 Gray, 122; *Cutler v. Tuttle*, 19 N. J. Eq. 561 (*semble*); *Wheeler v. Kirtland*, 23 N. J. Eq. 13, 22; *White v. Carpenter*, 2 Paige, 217, 238-241 (*semble*); *Sayre v. Townsends*, 15 Wend. 647 (*semble*); *Reynolds v. Morris*, 17 Ohio St. 510 (*semble*); *Billings v. Clinton*, 6 S. C. n. s. 90 (*semble*); *Perkins v. Cheairs*, 2 Baxter (Tenn.), 194, *accord*.

See *Eldredge v. Jenkins*, 3 Story, 181, 286; *Hall v. Young*, 37 N. H. 134. — ED.

⁸ See *supra*, p. 79, n. 1. — ED.

Statute of Frauds. It is sufficient if the purchase-money was lent to him by the grantee, provided the loan is clearly proved. And the grantee's admissions, like other parol evidence, though not competent in direct proof of the trust, are yet admissible to show that the purchase-money, by reason of such loan or otherwise, was the money of the alleged *cestui que trust*. *Kendall v. Mann*; ¹ *Blodgett v. Hildreth*; ² *Jackson v. Stevens*.³ In equity, a conveyance absolute on its face may be shown by parol evidence to have been intended as a mortgage only, and its effect limited accordingly. *Campbell v. Dearborn*.⁴ The finding of a master in matters of fact are not to be reviewed by the court, unless clearly shown to be erroneous. *Dean v. Emerson*.⁵ And in equity, as at law, the omission of a party to testify in control or explanation of testimony given by others in his presence is a proper subject of consideration. *Whitney v. Bayley*.⁶

It appears and is not controverted that the deed was made by Godfrey to the defendant, whose wife was the testator's sister: that the purchase-money was \$3,000, of which the testator furnished \$300 of his own money, and \$200 borrowed by him of Mrs. McGovern, upon a note signed by himself and the defendant; the defendant furnished \$600 of his own money and \$400 borrowed of Dolan upon the defendant's note; and for the remaining \$1,500 the defendant gave his own note, secured by mortgage on the premises, to Clements, who held a previous mortgage for a like amount, and who testified that before the purchase the defendant came to see if that mortgage could lie on the property, and told him that he was going to buy the land for the testator, and was told by the mortgagee that he must give a new mortgage, as he afterwards did, in discharge of the old one. The will recites that the defendant held a deed of certain real estate in trust for the testator's benefit, and had paid certain sums of money on his account, and directs that all such sums of money, with interest, should be paid back to him, and he should then convey the property in fee to the testator's wife. The attorney who drew the will certifies that he read this part of it in the testator's presence, and before its execution, to the defendant, and asked him if it was right, and he said it was, and upon being asked what claims he had against the place, answered \$600, besides \$100 for repairs and \$44.08 for taxes, and that he had received from the testator the whole amount with interest of the note to Dolan, except \$80, and that the testator had paid the note to Mrs. McGovern. The other material testimony may be taken as stated on the defendant's brief, namely, that the defendant repeatedly "admitted that he bought the place for John B. McDonough and that he meant to assist or help him;" that "the defendant said McDonough wanted him to buy the

¹ 11 Allen, 15.² 103 Mass. 484.³ 108 Mass. 94.⁴ 109 Mass. 130.⁵ 102 Mass. 480.⁶ 4 Allen, 173.

place for him;" "that he had always wanted John to take the deed, but he had not paid up;" and "that he was ready to fix up the place when McDonough was ready to pay up." The Master also reports that the defendant was present at the hearing before him, but did not offer to testify.

From this evidence the Master, who heard all the witnesses, was warranted in finding as matter of fact that the money paid by the defendant for the land was lent by him to the plaintiff for the purpose, and that thus the whole purchase-money was the plaintiff's money. Upon examination of the whole evidence, we see no sufficient cause for reversing the conclusion of the Master, and taking the facts as found by him; the inference of law follows that there was a resulting trust in favor of the testator, and that there must be a

*Decree for the plaintiff.*¹

¹ *Hidden v. Jordan*, 21 Cal. 92; *Millard v. Hathaway*, 27 Cal. 119; *Sandfoss v. Jones*, 35 Cal. 481; *Barrows v. Bohan*, 41 Conn. 278; *Cameron v. Ward*, 8 Ga. 245; *Coates v. Woodworth*, 13 Ill. 654; *Reeve v. Strawn*, 14 Ill. 94; *Fleming v. McHale*, 47 Ill. 282; *Wallace v. Carpenter*, 85 Ill. 590; *Honore v. Hutchings*, 8 Bush, 687; *Dudley v. Batchelder*, 53 Me. 403; *Keller v. Kunkel*, 46 Md. 565; *Jackson v. Stevens*, 108 Miss. 94; *Runnels v. Jackson*, 2 Miss. 358; *Kelley v. Johnson*, 28 Mo. 249; *Page v. Page*, 8 N. H. 187; *Howell v. Howell*, 2 McCart. 75; *Boyd v. McLean*, 1 Johns. Ch. 582; *Lounsbury v. Purdy*, 18 N. Y. 515; *Beck v. Graybill*, 28 Pa. 66; *Ragan v. Walker*, 1 Wis. 527, *accord*.

On the other hand, if the parties to the loan are reversed, *i.e.* if the nominal purchaser is the borrower, and the alleged *cestui que trust* is the lender, there is obviously no resulting trust. *Aveling v. Knipe*, 19 Ves. 441; *Bartlett v. Pickersgill*, 1 Eden, 515 (*semble*); *Smith v. Garth*, 32 Ala. 368; *McCue v. Gallagher*, 23 Cal. 51; *Loomis v. Loomis*, 28 Ill. 454; *Jenison v. Graves*, 2 Blackf. 440; *Hubble v. Alston*, 31 Ind. 249; *Jackson v. Stevens*, 108 Mass. 94; *Gibson v. Foote*, 40 Miss. 788; *Botsford v. Burr*, 2 Johns. Ch. 405.

The resulting trust is created, if ever, at the moment of the conveyance from the vendor. If the money, or security for payment, given at that time, is the money or security of the nominal purchaser, there can be no resulting trust. There is, accordingly, no trust in any of the following cases:—

(1.) Where the conveyance is to A., and subsequently B. advances the whole or a part of the purchase-money. *Sale v. McLean*, 29 Ark. 612; *Du Val v. Marshall*, 30 Ark. 230; *Dikeman v. Corrie*, 36 Cal. 94 (*semble*); *Alexander v. Tams*, 13 Ill. 221; *Walter v. Clock*, 55 Ill. 362; *Graves v. Dugan*, 6 Dana, 331; *Connor v. Lewis*, 16 Me. 268; *Buck v. Swasey*, 35 Me. 41; *Gerry v. Stimson*, 60 Me. 186; *McCarroll v. Alexander*, 48 Miss. 128; *Francetown v. Deering*, 41 N. H. 438; *Botsford v. Burr*, 2 Johns. Ch. 405; *Rogers v. Murray*, 3 Paige, 390; *Wells v. Stratton*, 1 Tenn. Ch. 328.

(2.) Where it is orally agreed between A. and B. that A., as B.'s agent, shall take a conveyance in the name of B., but A., in violation of his agreement, takes the conveyance in his own name. *Bartlett v. Pickersgill*, 1 Eden, 515. (*Conf.* *Lees v. Nuttall*, 1 Russ. & M. 53; *Heard v. Pilley*, L. R. 4 Ch. Ap. 548; *Cave v. Mackenzie*, 46 L. J. Ch. 564; *Chattock v. Muller*, 8 Ch. D. 177); *First Bank v. Burrell*, 3 Fed. Rep. 694; *Burden v. Sheridan*, 36 Iowa, 125; *Fishli v. Dumaresly*, 3 A. K. Marsh. 23; *Farnham v. Clements*, 51 Me. 426, 428 (*semble*); *Miazza v. Yerger*, 53 Miss. 135. But see *contra*, *Strong v. Glasgow*, 2 Murph. 289; *Hutchinson v. Hutchinson*, 4 Dess. 77.

(3.) Where it is orally agreed between A. and B. that A. shall take the conveyance in

his own name, and subsequently reconvey to B. upon payment of the amount originally advanced, with interest. *Lamas v. Bayley*, 2 Vern. 627; *Bartlett v. Pickersgill*, 1 Eden, 515; *Walker v. Klock*, 55 Ill. 362; *Minot v. Mitchell*, 30 Ind. 228; *Pearson v. East*, 36 Ind. 27; *Fowke v. Slaughter*, 3 A. K. Marsh. 57; *Hunt v. Roberts*, 40 Me. 187; *Farnham v. Clements*, 51 Me. 426; *Dorsey v. Clark*, 4 Har. & J. 551; *Hollida v. Shoop*, 4 Md. 465; *Kendall v. Mann*, 11 All. 15 (see also *Davis v. Wetherell*, 11 All. 19; *Barnard v. Jewett*, 97 Mass. 87; *Jackson v. Stevens*, 108 Mass. 94); *Nestall v. Schmid*, 29 N. J. Eq. 458; *Heacock v. Coatesworth*, Clarke Ch. 83; *Lathrop v. Hoyt*, 7 Barb. 59; *Getman v. Getman*, 1 Barb. Ch. 499; *Levy v. Brush*, 45 N. Y. 589; *Wheeler v. Reynolds*, 66 N. Y. 227; *Robertson v. Robertson*, 9 Watts, 32; *Fox v. Heffner*, 1 Watts & S. 372; *Jackman v. Ringland*, 4 Watts & S. 149; *Kellum v. Smith*, 38 Pa. 158; *Payne v. Patterson*, 77 Pa. 134; *Wolford v. Herrington*, 86 Pa. 39; *Bennett v. Dollar Bank*, 87 Pa. 382; *Pinnock v. Clough*, 16 Vt. 500. But see *contra*, *Chastain v. Smith*, 30 Ga. 96.

But if property in which B. has an interest — e.g. as mortgagor, execution debtor, and the like — is about to be sold at auction, and A., by orally agreeing to buy for B.'s benefit, and to reconvey to him upon repayment of the amount advanced, with interest, induces B. not to take steps to protect his interest, whereby A. obtains the property for less than its value, A. will be compelled to hold the estate according to the terms of his agreement, notwithstanding the Statute of Frauds. *Chattock v. Muller*, 8 Ch. D. 177; *Trapnall v. Brown*, 19 Ark. 39; *Arnold v. Cord*, 16 Ind. 177; *Judd v. Mosely*, 30 Iowa, 423; *Miller v. Antle*, 2 Bush, 407; *Crutcher v. Hord*, 4 Bush, 360; *Taylor v. Boardman*, 24 Mich. 287 (*semble*); *Soggins v. Heard*, 31 Miss. 426; *Combs v. Little*, 3 Green Ch. 310; *Brannin v. Brannin*, 3 C. E. Green, 212; *Brown v. Lynch*, 1 Paige, 147; *Ryan v. Dox*, 34 N. Y. 307; *Sandford v. Norris*, 4 Abb. App. 144; *Sharp v. Long*, 28 Pa. 432 (*semble*); *Cook v. Cook*, 69 Pa. 443; *Boynnton v. Housler*, 73 Pa. 453; *Wolford v. Herrington*, 86 Pa. 39; *Jenckes v. Cook*, 9 R. I. 520; *Denton v. McKenzie*, 1 Dess. 289; *Keith v. Purvis*, 4 Dess. 114; *Cox v. Cox*, 5 Rich. Eq. 365; *Loyd v. Currier*, 3 Hum. 462. Similarly, although there is no agreement between A. and B., if A. declares at the sale that he is buying for B., whereby others refrain from bidding, A. will be compelled to hold the property thereby obtained in trust for B. *McRae v. Huff*, 32 Ga. 681; *Roach v. Hudson*, 8 Bush, 410 (*semble*); *Brown v. Dysinger*, 1 Rawle, 408. In *Chattock v. Muller*, 8 Ch. D. 177, where A., by undertaking orally to buy an estate and to convey to B. a portion which B. greatly desired to obtain, lulled him into inactivity in the matter, and afterwards, having obtained the property, refused to convey the desired portion to B., it was decided that B. could compel performance of the agreement. See also *Atkins v. Rowe*, *Mosely*, 39; *Rastel v. Hutchinson*, 1 Dick. 44.

If B., who is entitled by contract to call for a conveyance from C., is induced to direct C. to make the conveyance to A., upon the faith of A.'s oral undertaking to hold the property in trust for B., A. must perform the trust. *Dodge v. Wellman*, 1 Abb. App. 512; *Seichrist's Appeal*, 66 Pa. 237; *Squire's Appeal*, 70 Pa. 266.

The American authorities upon resulting trusts are to the same effect as the English decisions, e.g. :—

GENERAL PRESUMPTION FROM PAYMENT OF PURCHASE-MONEY. — If A. takes the conveyance and B. furnishes the purchase-money, there is presumptively a resulting trust in favor of B. *Taliaferro v. Taliaferro*, 6 Ala. 404 (*semble*); *Caple v. McCollum*, 27 Ala. 461; *Lee v. Browder*, 51 Ala. 238 (*semble*); *McGuire v. Ramsey*, 9 Ark. 518; *Osborne v. Endicott*, 6 Cal. 149; *Bayles v. Baxter*, 22 Cal. 575; *Simson v. Eckstein*, 22 Cal. 589; *Settembre v. Putnam*, 30 Cal. 490; *Currey v. Allen*, 34 Cal. 254; *Newell*

v. Morgan, 2 Harringt. 225; *Prevo v. Walters*, 5 Ill. 35 (*semble*); *Smith v. Sackett*, 10 Ill. 534; *Seaman v. Cook*, 14 Ill. 501; *Nichols v. Thornton*, 16 Ill. 113; *Roberts v. Opp*, 56 Ill. 34; *Mahoney v. Mahoney*, 65 Ill. 406 (*semble*); *Loften v. Witboard*, 92 Ill. 461; *Mathis v. Stufflebeam*, 94 Ill. 481; *Elliott v. Armstrong*, 2 Blackf. 198 (*semble*); *Blair v. Bass*, 4 Blackf. 539; *Resor v. Resor*, 9 Ind. 347; *Miller v. Blackburn*, 14 Ind. 62 (*semble*); *McLenan v. Sullivan*, 13 Iowa, 521; 2 Iowa, 437, s. c.; *Tinsley v. Tinsley*, 52 Iowa, 14; *Perry v. Head*, 1 A. K. Marsh. 46; *Deatly v. Murphy*, 3 A. K. Marsh. 472; *Hall v. Sprigg*, 7 Mart. 243; *Buck v. Pike*, 11 Me. 9; *Baker v. Vining*, 30 Me. 121; *Buck v. Swazey*, 35 Me. 41; *Dwinel v. Veezie*, 36 Me. 509; *Kelley v. Jeuness*, 50 Me. 455; *Whitmore v. Learned*, 70 Me. 276 (*semble*); *Purdy v. Purdy*, 3 Md. Ch. 547 (*semble*); *Cecil Bank v. Snively*, 23 Md. 253; *Peabody v. Tarbell*, 2 Cush. 232; *Perkins v. Nichols*, 11 All. 542; *Mahorner v. Harrison*, 21 Miss. 53; *Capers v. McCaa*, 41 Miss. 479 (*semble*); *Harvey v. Ledbetter*, 48 Miss. 95; *Taylor v. Mosely*, 57 Miss. 544; *Paul v. Chouteau*, 14 Mo. 580; *Ringo v. Richardson*, 53 Mo. 385 (*semble*); *Kennedy v. Kennedy*, 57 Mo. 73 (*semble*); *Scoby v. Blanchard*, 3 N. H. 170; *Pritchard v. Brown*, 4 N. H. 397; *Tyford v. Thurston*, 16 N. H. 399; *Packard v. Putnam*, 57 N. H. 43; *Depeyster v. Gould*, 2 Green Ch. 474; *Stratton v. Dialogue*, 16 N. J. Eq. 70; *Johnson v. Dougherty*, 18 N. J. Eq. 406; *Midmer v. Midmer*, 26 N. J. Eq. 299 (*semble*); *Havens v. Bliss*, 26 N. J. Eq. 363; *Bunn v. Mitchell*, 27 N. J. Eq. 54; *Frederick v. Haas*, 5 Nev. 389; *Henderson v. Hoke*, 1 Dev. & B. Eq. 149 (*semble*); *Williams v. Van Tuyl*, 2 Ohio St. 336; *McGovern v. Knox*, 21 Ohio St. 547; *Gregory v. Setter*, 1 Dall. 193; *Lynch v. Cox*, 23 Pa. 265; *Edwards v. Edwards*, 39 Pa. 369; *Kline's Appeal*, 39 Pa. 463; *Harrold v. Lane*, 53 Pa. 268; *Williams v. Hollingsworth*, 1 Strob. Eq. 103; *Smitheal v. Gray*, 1 Hum. 491; *Click v. Click*, 1 Heisk. 607; *Gass v. Gass*, 1 Heisk. 613; *Johnson v. Anderson*, 7 Baxt. 251; *Barker v. Barker*, 7 Baxt. 353; *Tarpley v. Poage*, 2 Tex. 139; *Long v. Steiger*, 8 Tex. 460; *Oberthier v. Stroud*, 33 Tex. 522; *Pinney v. Fellows*, 15 Vt. 525; *Union Bank v. Carrington*, 7 Leigh, 566; *Miller v. Blose*, 30 Grat. 744; *Jennings v. Shacklett*, 30 Grat. 765; *Whiting v. Gould*, 2 Wis. 552 (*semble*).

The presumption of a resulting trust was rebutted by the evidence in *Livermore v. Aldrich*, 5 Cush. 431; *Bibb v. Smith*, 12 Heisk. 728; *Carter v. Montgomery*, 2 Tenn. Ch. 216.

It was held in *Martin v. Lincoln* (Tenn. 1880), 10 C. L. J. 490, 11 C. L. J. 5, s. c., that the presumption of a resulting trust would not be rebutted by evidence that a conveyance to A., the purchase-money being furnished by B., was understood by the parties at the time to be in trust for C. See also *Kelly v. Johnson*, 34 Mo. 400. But these cases seem erroneous. See *Bellasis v. Compton*, 2 Vern. 294.

STATUTORY CHANGES. — The rule as to resulting trusts has been modified by statute in some of the United States. *Wynn v. Sharer*, 23 Ind. 573; *Noble v. Morris*, 24 Ind. 478; *Glidwell v. Shaugh*, 26 Ind. 319; *Milliken v. Ham*, 36 Ind. 166; *Franklin v. Colley*, 10 Kan. 260; *Winkfield v. Brinkman*, 21 Kan. 682; *Groesbeck v. Seely*, 13 Mich. 329; *Campbell v. Campbell*, 26 Mich. 428; *Weare v. Linnell*, 29 Mich. 224; *Murch v. Shabel*, 37 Mich. 166; *Irvine v. Marshall*, 7 Minn. 256; *Johnson v. Johnson*, 16 Minn. 512; *Lounsbury v. Purdy*, 18 N. Y. 515; *McCartney v. Bostwick*, 32 N. Y. 53; *Brown v. Cherry*, 59 Barb. 628; *Gilbert v. Gilbert*, 1 Keyes, 159; 2 Abb. App. 256, s. c.; *Siemon v. Church*, 29 N. Y. 598; *Foot v. Bryant*, 47 N. Y. 544; *Cipperly v. Cipperly*, 4 Th. & C. 343; *Hurst v. Harper*, 14 Hun, 280.

Conf. the analogous English decisions under the old Registry Acts; namely, *Ex parte Yallop*, 15 Ves. 60; *Ex parte Houghton*, 17 Ves. 251; *Camden v. Anderson*, 5 T. R. 709; *Holderness v. Lamport*, 29 Beav. 129. But see now 17 & 18 Vict. c. 104, §§ 37 et seq.; 25 & 26 Vict. c. 63, § 3.

ADVANCEMENT TO A CHILD. — A conveyance to a child, the parent paying the

purchase-money, is presumed to be intended as an advancement for the child. *Cartwright v. Wise*, 14 Ill. 417; *Stanly v. Brannan*, 6 Blackf. 193; *Baker v. Leathers*, 3 Ind. 558; *Slack v. Slack*, 26 Miss. 287; *Gee v. Gee*, 32 Miss. 190; *Page v. Page*, 8 N. H. 202 (*semble*); *Partridge v. Havens*, 10 Paige, 618; *Proseus v. McIntyre*, 5 Barb. 424; *Tremper v. Burton*, 18 Ohio, 418; *Murphy v. Nathans*, 46 Pa. 508; *Shaw v. Read*, 47 Pa. 96; *Douglas v. Price*, 4 Rich. Eq. 322; *Thompson v. Thompson*, 1 Yerg. 97. The presumption of advancement has been held to arise in favor of an adopted child (*Astreen v. Flanagan*, 3 Edw. 279); of a brother, treated as a child (*Higdon v. Higdon*, 57 Miss. 264; *Creed v. Lancaster Bank*, 1 Ohio St. 1).

The presumption of an advancement was held to be rebutted by the evidence in the following cases: *Butler v. Ins. Co.*, 14 Ala. 777; *Taylor v. Taylor*, 9 Ill. 303; *Doyle v. Sleeper*, 1 Dana, 531; *Peer v. Peer*, 3 Stockt. 432; *Jackson v. Matdorf*, 11 Johns. 91; *Dudley v. Bosworth*, 10 Hum. 9; *Shepard v. White*, 10 Tex. 72; *Rankin v. Harper*, 23 Mo. 579.

PROVISION FOR A WIFE. A conveyance taken in the name of a wife, the purchase-money being paid by the husband, is presumed to be intended as a provision for the wife. *Lochenour v. Lochenour*, 61 Ind. 595; *Sunderland v. Sunderland*, 19 Iowa, 325; *Spring v. Hight*, 22 Me. 409; *Stevens v. Stevens*, 70 Me. 92; *Groff v. Rohrer*, 35 Md. 327 (*semble*); *Whitten v. Whitten*, 3 Cush. 191; *Cairns v. Colburn*, 104 Mass. 274; *Edgerly v. Edgerly*, 112 Mass. 175; *Warren v. Brown*, 25 Miss. 66; *Fatheree v. Fletcher*, 31 Miss. 265; *Alexander v. Warrance*, 17 Mo. 228; *Dickenson v. Davis*, 43 N. H. 647 (qualifying *Pembroke v. Allentown*, 21 N. H. 107, and *Tebbetts v. Tilton*, 21 N. H. 283); *Linker v. Linker*, 32 N. J. Eq. 174; *Welton v. Divine*, 20 Barb. 9; *Smith v. Strahan*, 16 Tex. 314; *Bent v. Bent*, 43 Vt. 555; *Irvine v. Greene*, 32 Grat. 411.

The presumption of a provision was held to be rebutted by the evidence in the following cases: *Wilson v. Beauchamp*, 44 Miss. 556; *Seibold v. Christman*, 7 Mo. Ap. 254; *Persons v. Persons*, 25 N. J. Eq. 250; *Wallace v. Bowen*, 28 Vt. 638. *Conf. Wait v. Day*, 4 Den. 439 (a conveyance to a mistress).

If the purchase-money is paid by B., and A. is made the nominal grantee for an illegal purpose, *e.g.* to place the property beyond the reach of B.'s creditors, it is said that B. cannot charge A. as trustee, even though the illegal purpose has not been effectuated. *Groves v. Groves*, 3 Y. & J. 163 (*semble*); *Baldwin v. Campfield*, 4 Halst. Ch. 891 (*semble*); *Proseus v. McIntyre*, 5 Barb. 424. See, however, *Perkins v. Nicholl*, 11 All. 242. But as between A. and the creditors of B., the beneficial interest in the property is, of course, to be treated as belonging to B. *Newell v. Morgan*, 2 Harringt. 225; *Demaree v. Driskell*, 3 Blackf. 115; *Belford v. Crane*, 16 N. J. Eq. 265; *Guthrie v. Gardner*, 19 Wend. 414; *Brewster v. Power*, 10 Paige, 562; *Wait v. Day*, 4 Den. 439; *Garfield v. Hatmaker*, 15 N. Y. 475; *Kimmel v. McRight*, 2 Barr, 38. — Ed.

CHAPTER V.

ORAL TRUSTS, WHICH ARE ENFORCED TO PREVENT THE
USE OF THE STATUTES OF FRAUDS AND WILLS, AS IN-
STRUMENTS OF FRAUD.

STICKLAND v. ALDRIDGE.

IN CHANCERY, BEFORE LORD ELDON, C., JUNE 6, 1804.

[*Reported in 9 Vesey, 516.*]

THE bill, filed by an heir-at-law, stated that William Stickland, being seised in fee of certain lands, and being desirous of devising the same for the purpose of erecting a chapel thereon for the sect called Methodists, but knowing that an express devise for that purpose would be void, as within the Statute of Mortmain,¹ requested the Reverend Adam Aldridge to undertake, in case he devised the said premises to him, to build the said chapel thereon; and Aldridge, having undertaken so to do, Stickland, by his will, dated the 27th of April, 1802, gave, devised, and bequeathed "to the Reverend Adam Aldridge, and his assigns," the said premises.

The bill then stated the entry of Aldridge under the will; and that, the devise having been made upon an implied trust, that Aldridge would upon the devised premises build and erect a chapel, is void, as within the Statute of Mortmain; and that the plaintiff, as heir-at-law, is entitled; and charged that the defendant did, before the testator made his will, enter into some agreement with the testator, or in some manner promise or undertake, or give him to understand, that if he would devise the estate to the defendant, he would build and erect the said chapel, or some chapel, thereupon; and that the testator would not have devised the estate to him had he not entered into such agreement, or given such promise, &c., or that there was some implied undertaking or agreement between him and the testator, that the defendant should erect a chapel, &c., and that it is his intention, in case he retains the land, to build a chapel thereon; and that he has frequently acknowledged in conversation, that the estate was devised to him upon some such secret trusts as aforesaid, or for some other charitable purposes.

The bill, therefore, prayed a discovery; that the devise may be declared void, as within the Statute of Mortmain; that the defendant may deliver possession, and an account.

¹ Stat. 9 Geo. II. c. 36.

The defendant, as to so much of the bill as seeks a discovery, as to the supposed agreement, promise, undertaking, or acknowledgment; and as to the relief, pleaded in bar the Statute of Frauds;¹ and averred, that he never did sign any writing whereby he declared any trust or confidence concerning the lands devised.

Mr. Grimwood, in support of the plea. No case has gone the length of this bill; resting simply upon allegation, without any evidence or inference from the will. In that respect *Muckleston v. Brown*² is distinguished; the codicil containing expressions, denoting some trusts; and written acknowledgments by the defendants, that they were to take upon trusts, for charity, being produced. In *Adlington v. Cann*³ also there was ground for the inference of fraud. Your Lordship, it may be said, relied upon the principle, that the statute shall not be used to cover fraud. But can that be applied to this naked case of allegation by the heir, that the defendant takes upon a secret trust? This is a devise to the defendant and his assigns, which passing only an estate for life, negatives the idea of a trust for a permanent charitable purpose.

Mr. Newbolt, for the plaintiff. The objection last mentioned may be taken at the hearing, but is now premature. Upon the authority of *Muckleston v. Brown*, and the principle that a party shall not pervert a statute, made to prevent a fraud, to the object of committing fraud, this defendant is bound to answer. The heir claims upon the ground, that the trust is ineffectually declared. The defendant cannot take for his own interest. In *Cottingham v. Fletcher*,⁴ the opinion of Lord Hardwicke, as to the effect of a demurrer, turned upon the conduct of the plaintiff.

THE LORD CHANCELLOR (ELDON). It would be a strong proposition, that the providence of the legislature, having attempted expressly to prevent a disposition of land for purposes of this sort, was so short as to be baffled by such a transaction as is stated by this bill. The statute was never permitted to be a cover for fraud upon the private rights of individuals; and though within the intention it cannot be said a trust is declared under these circumstances, it is clear, a trust would be created upon the principle on which this court acts as to fraud. In the ordinary case of an estate suffered to descend, the owner being informed by the heir, that, if the estate is permitted to descend, he will make a provision for the mother, wife, or other person, there is no doubt this court would compel the heir to discover whether he did make such promise. So, if a father devises to his youngest son, who prom-

¹ Stat. 29 Ch. II. c. 3.

² 6 Ves. 52. That case, having been argued upon the answer, admitting the trust, was compromised.

³ 3 Atk. 141.

⁴ 2 Atk. 155.

ises, that if the estate is devised to him, he will pay £10,000 to the eldest son, this court would compel the former to discover whether that passed in parol; and, if he acknowledged it, even praying the benefit of the statute, he would be a trustee to the value of £10,000;¹ and then, why upon a similar principle should not a trust be raised, as to the whole value of the estate, the promise extending to the whole? It would be singular if the court would protect individuals and would not act to prevent a fraud upon the law itself. But it is not necessary to decide this case upon the dry principle: the cases alluded to in *Muckleston v. Brown* being authority upon it. In *Adlington v. Cann*, Lord Hardwicke was clearly of opinion, that there being nothing in the will attaching a trust, if the testator afterwards by an unattested paper, expressing his own intention, not communicated, said, the purpose was to devote the estate to a charitable purpose, the devisee might object that he had taken under a will well executed; and the subsequent paper was not well executed. But that is perfectly different from the case of a deviser expressing in the paper a trust, which by contract with the devisee led to that devise; and Lord Chief Baron Parker accordingly said,² Lord Hardwicke's opinion was, that such a bill must be answered; and Sir Thomas Sewell meant to follow it.³ I formerly expressed doubt,⁴ whether he rightly decided upon the principle; but the principle he took to be clear law; and that is sufficient.

Let the plea stand for an answer, with liberty to except; and the defendant may make what he can of praying the benefit of the statute in his answer.⁵

¹ *Barrow v. Greenough*, 3 Ves. 152, and the note, 155.

² *The Attorney-General v. Duplessis*, Park. 144.

³ *Bishop v. Talbot*, stated, 6 Ves. 60.

⁴ 6 Ves. 68.

⁵ In accordance with the decision in the principal case, an oral trust was established against the heir, devisee, or legatee of a deceased person in the following cases:—

Against an heir.—*Chamberlain v. Chamberlain*, 2 Eq. Ab. 43, pl. 2; *Freem. C. C.* 34, s. c.; *Sellack v. Harris*, 2 Eq. Ab. 46; 5 Vin. Ab. 521, s. c. See also *Devenish v. Baynes*, Pr. Ch. 3; 2 Eq. Ab. 43, pl. 4, s. c.; *Harris v. Howell*, Gilb. Eq. 11.

Against a legatee or devisee.—*Thynn v. Thynn*, 1 Vern. 296; *Oldham v. Litchfield*, 2 Vern. 506; *Freem. C. C.* 284, s. c.; *Kingsman v. Kingsman*, 2 Vern. 559; *Drakeford v. Wilks*, 3 Atk. 539; *Reech v. Kennigate*, Amb. 67; 1 Ves. 123; 1 Wils. 227, s. c.; *Strode v. Winchester*, 1 Dick. 397; *Barrow v. Greenough*, 3 Ves. Jr. 152; *Chamberlain v. Agar*, 2 V. & B. 259; *Russell v. Jackson*, 10 Hare, 204; *Tee v. Ferris*, 2 Kay & J. 357; *Irvine v. Sullivan*, L. R. 8 Eq. 673; *Springett v. Jennings*, L. R. 10 Eq. 488; L. R. 6 Ch. Ap. 333, s. c.; *Norris v. Frazer*, L. R. 15 Eq. 318; *Lester v. Foxcroft*, Colles P. C. 108; *Segrave v. Kirwan*, Beatt. 164; *Gray v. Gray*, 11 Ir. Ch. 218; *Att'y-Gen. v. Dillon*, 13 Ir. Ch. 127.

De Laurencel v. De Boom, 48 Cal. 581; *Dowd v. Tucker*, 41 Conn. 197; *Browne v. Browne*, 1 Har. & J. 430; *Owing's Case*, 1 Bland, 370; *Gaither v. Gaither*, 3 Md. Ch. 158; *Hooker v. Axford*, 33 Mich. 453; *Williams v. Fitch*, 18 N. Y. 546 (see also *Spicer v. Spicer*, 16 Abb. Pr. N. s. 112); *Williams v. Vreeland*, 29 N. J. Eq. 417;

DAVIES v. OTTY.

IN CHANCERY, BEFORE SIR JOHN ROMILLY, M. R., FEBRUARY 8, 10,
15, 1865.

[*Reported in 35 Beavan, 208.*]

THIS case, which is reported 33 Beav. 540, on a demurrer, now came on for a hearing, but upon allegations of a different state of facts, which the plaintiff had introduced by amendment. The following statement is founded on the conclusions arrived at by the court, upon the evidence in the cause.

It appeared that, in 1860, the plaintiff Davies was entitled to three and a half shares in a building society and to a piece of land and some houses, which he had mortgaged to the society in the usual way in such cases, for securing to the society an advance of money made to him.

By an indenture dated the 17th of January, 1860, made between the plaintiff Davies of the one part and the defendant Otty (his stepson) of the other part. This indenture recited the plaintiff's title, and proceeded as follows:—

“And whereas Matthew Otty has taken from Thomas Davies all his shares in the said benefit building society, and has contracted and agreed with Thomas Davies for the absolute purchase of the said piece of land, messuages,” &c. “(subject to the payment by Matthew Otty, his heirs, executors, administrators, or assigns, of all the payments which from the 6th day of January instant, shall become payable for or in respect of the shares in the said society so taken by the said Matthew Otty from the said Thomas Davies as aforesaid) for the sum of £20.” It then witnessed that the plaintiff, in consideration of £20 paid by the defendant to the plaintiff and of the defendant's covenant, conveyed to the defendant and his heirs the land and houses, subject to the mortgage and to the payments to the building society. And

32 N. J. Eq. 135, 734, s. c. ; Hoge v. Hoge, 1 Watts, 163 ; McKee v. Jones, 6 Barr, 425 ; Church v. Ruland, 64 Pa. 432 ; Williams's Appeal, 73 Pa. 249 ; Rutledge v. Smith, 1 McC. Ch. 119 ; Richardson v. Adams, 10 Yerg. 273 ; McLellan v. McLean, 2 Head, 684 ; Brook v. Chappell, 34 Wis. 405.

But see *Bedilian v. Seaton*, 3 Wall. Jr. 279.

Where a testator is prevented from making a due revocation of his will by the fraudulent representation of a beneficiary thereunder, that the will has been already destroyed in accordance with the testator's wishes, the party claiming under the will, it has been said extra-judicially, will hold the property in trust for the heir or next of kin of the testator. *Gaines v. Gaines*, 2 A. K. Marsh. 190 (*semble*) ; *Blanchard v. Blanchard*, 32 Vt. 62 (*semble*). But the decision in *Kent v. Mahaffey*, 10 Ohio St. 204, is *contra*. See also *Clingan v. Mitcheltree*, 31 Pa. 25. — Ed.

the defendant covenanted to make the several payments to the building society, and to indemnify the plaintiff therefrom.

The circumstances under which this deed was executed appeared to be as follows: "In 1844, the plaintiff's wife deserted him, and left the place with her paramour. In 1854, the plaintiff (who had never heard of his wife since her elopement, and believed her to be dead) married a second wife. Five or six years afterwards (1860), the plaintiff was informed that his first wife was still living, and, fearing a prosecution for bigamy, an arrangement was come to between the plaintiff and defendant, that the plaintiff should transfer the above property until the "difficulty" in which the plaintiff was had passed over. It was proved by two witnesses that the "distinct understanding" between them was, that the transfer "was to be a nominal one, and was to be done away with when the unpleasantness was over." The plaintiff afterwards discovered that the lapse of seven years from the time he knew that his first wife was alive protected him against any proceedings for bigamy, and, in 1863, he called on the defendant to reconvey the property to him. This the defendant refused to do, and he claimed it beneficially as his own.

It was proved that the plaintiff had in the mean time been allowed to remain in possession of the property, and that the plaintiff had himself made the several payments to the society. The consideration of £20 was not paid in money on the execution of the deed; but the defendant, who, at that time, held the bill of the plaintiff for that amount, alleged that the non-payment of this bill was the real consideration. But it was also proved that the amount of this bill had been paid by the plaintiff to the defendant since the execution of the deed.

The defendant denied the trust, and insisted on the Statute of Frauds, 29 Car. II. c. 3.

THE MASTER OF THE ROLLS. Upon considering this case, and looking at the various authorities on the subject, and after referring again to the evidence, I am of opinion that the Statute of Frauds can have no application to this case.

Assuming (which I do for the present) that there was nothing whatever illegal in the transaction (the existence of which would, of course, alter the case), I consider it is proved by the evidence that the plaintiff, apparently in a difficulty, or afraid of getting into one, transferred this property to the defendant, who thereupon agreed that he would re-transfer it to the plaintiff when required; but when the time for the re-transfer arrived, the defendant refused to re-transfer it. Such being the facts, I am of opinion that it is not a case to which the Statute of Frauds applies. There was no consideration paid by the defendant, the £20 mentioned in the deed never having been paid; for the plaintiff's bill of exchange held by the defendant, and which he states to be

the consideration for the deed, appears by the evidence to have been afterwards repaid by the plaintiff by instalments in various sums. This being so, I am of opinion that "it is not honest to keep the land." If so, this is a case in which, in my opinion, the Statute of Frauds does not apply. I think that the subsequent course of dealing confirms this view; for the plaintiff has ever since been allowed to remain in possession of the property, and he has paid all the instalments to the benefit building society. In my opinion, therefore, this case comes within the eighth section of the Statute of Frauds, and is excepted from the operation of the prior section. Therefore, the case is not such as entitles the defendant to set up the Statute of Frauds as a ground for allowing him to retain the property.

I am also clearly of opinion there was no illegality in the transaction, and that the plaintiff was quite justified, morally and legally, in marrying the second wife, although the effect of it may have been that she did not become his wife. The long absence of his first wife was sufficient to justify the plaintiff in coming to the conclusion that she was dead, and would have induced this court to have come to the same conclusion, and possibly to have acted on it, by paying money out of court on that footing. That being so, I am of opinion that the plaintiff is entitled to a decree.

The costs of the conveyance were paid for by the defendant, and I am of opinion that the plaintiff ought to repay them; and, upon the plaintiff's undertaking to repay them, I shall order a re-conveyance at the expense of the plaintiff. Cancelling the deed would not be sufficient, unless it was originally void, and I do not think it was. The plaintiff must have his costs of suit.¹

JONES v. BADLEY.

IN CHANCERY, BEFORE LORD CAIRNS, C., MARCH 4, 5, APRIL 15, 1868.

[*Reported in Law Reports, 3 Chancery Appeals, 362.*]

THIS was a suit by the co-heiresses and next of kin of Caroline E. Pargeter, seeking to establish that the defendants, the residuary devisees and legatees of Caroline E. Pargeter, were trustees for the plaintiffs, on the ground that the gift was made to the devisees on a secret trust for charitable purposes.

¹ See *Ward v. Lant*, Prec. Ch. 182; *Birch v. Blagrove*, Amb. 264; *Platamone v. Staple*, G. Cooper, 250; *Roberts v. Roberts*, 2 B. & Al. 367; *Brackenbury v. Brackenbury*, 2 Jac. & W. 391; *Cecil v. Butcher*, 2 Jac. & W. 565; *Childers v. Childers*, 1 De G. & J. 482; *Booth v. Turle*, L. R. 16 Eq. 182. — ED.

The Master of the Rolls held that the secret trust had been established, and that the defendants must be declared trustees for the plaintiffs, as reported,¹ where the facts are fully stated.

The defendants appealed, and the case was partly heard before Lord Chelmsford, who resigned the Great Seal before the arguments were concluded. The case was then heard by Lord Cairns.

Sir Roundell Palmer, Q. C., and *Mr. F. C. J. Millar*, for the appellants.

Mr. Jessel, Q. C., and *Mr. Sargant*, for the plaintiffs.

Mr. Baggalay, Q. C., and *Mr. Peck*, for the executors.

Sir Roundell Palmer, in reply.

[The same cases were cited, and nearly the same arguments were used, as on the hearing of the court below. *Burney v. Macdonald*² was also referred to.]

LORD CAIRNS, L. C. In this case a bill was filed by the plaintiffs as heiresses-at-law and next of kin of Miss Caroline E. Pargeter, of Foxcote, near Dudley, who died on the 26th of April, 1864, at the age of sixty-five. Miss Pargeter, by her will, dated the 8th of August, 1862, after several specific devises and pecuniary bequests, gave all the residue of her real property and of her property savoring of realty to the defendants, John Badley and James Payton Badley, as joint tenants. The plaintiffs insist that this residue was given on a secret trust for charity, and by this bill prayed that the defendants, the Badleys, might be declared to be trustees of it for the plaintiffs. The Master of the Rolls, by his decree, dated the 14th of January, 1867, has made a declaration to this effect, and directed accounts and inquiries upon that footing, and from that decree this appeal is brought.

Upon the law applicable to such a case there is no controversy. Both appellants and respondents were content to take it, as the Master of the Rolls took it, from the clear and felicitous exposition of it by Lord Justice Wood, when Vice-Chancellor, in the case of *Wallgrave v. Tebbs*.³ Where a person knowing that a testator, in making a disposition in his favor, intends it to be applied for purposes other than for his own benefit, either expressly promises, or by silence implies, that he will carry the testator's intention into effect, and the property is left to him upon the faith of that promise or undertaking, it is in effect a case of trust, and in such case the court will not allow the devisee to set up the Statute of Frauds, or, rather, the Statute of Wills, by which the Statute of Frauds is now in this respect superseded, and for this reason: The devisee, by his conduct, has induced the testator to leave him the property, and, as the Lord Justice Turner says in *Russell v. Jackson*,⁴ no one can doubt that if the devisee had stated that he would

¹ Law Rep. 3 Eq. 635.

³ 2 K. & J. 313.

² 15 Sim. 6; 9 Jur. 588.

⁴ 10 Hare, 204.

not carry into effect the intentions of the testator, the disposition in his favor would not have been found in the will. But in this the court does not violate the spirit of the statutes; but for the same end, namely, prevention of fraud, it engrafts the trusts on the devise by admitting evidence which the statute would in terms exclude, in order to prevent a devisee from applying property to a purpose foreign to that for which he undertook to hold it. Another test, which is founded on the same principles, and which has sometimes been applied, is to consider the case as unaffected by the Statutes of Mortmain or Wills, and then to inquire whether a trust has been imposed by the testatrix, and accepted by the devisee in such a way that a court of equity would enforce it as binding on the conscience of the devisee.

The law applicable to the case, being, therefore, free from doubt, we have to examine the facts for the purpose of ascertaining the answers to two questions. First, Did the testatrix, so far as her own mind and intention were concerned, devise her residue to the Messrs. Badley in order that they might take, not beneficially, but as trustees for the accomplishment of some charitable purpose? And, secondly, if the first question is answered in the affirmative, was her mind and intention in this respect made known before her death to the Messrs. Badley, or either of them, and was the devise accepted by them, or either of them, expressly or tacitly on this footing?

As to both of these questions, the onus of establishing the affirmative must be upon the plaintiffs. [His Lordship then commented on the evidence at length.]

On the whole, I am of opinion that whatever charitable desire or object may have existed in the mind of the testatrix when she made this devise of the residue, the plaintiffs have entirely failed to show that any secret trust for charity was communicated to, much less accepted or acquiesced in by, the defendants or either of them.

I am of opinion that the decree must be reversed, and the bill dismissed. I assume that in such a case no costs will be asked for.¹

¹ See also *Whitton v. Russell*, 1 Atk. 448; *Podmore v. Gunning*, 7 Sim. 644; *Wallgrave v. Tebbes*, 2 Kay & J. 313; *Tee v. Ferris*, 2 Kay & J. 357; *Lomax v. Ripley*, 3 Sm. & G. 48; *McCormick v. Grogan*, L. R. 4 H. L. 82; *Rowbotham v. Dunnnett*, 8 Ch. D. 430; *Creagh v. Murphy*, Ir. R. 7 Eq. 182; *Collins v. Hope*, 20 Ohio, 492; in which cases the evidence was considered insufficient to establish an alleged trust.

If property is given by will to two or more persons as joint tenants, and a secret understanding can be shown to have existed between the testator and any one of them that the donees should hold the property as trustees, the trust will be enforced as to the entire property given. *Russell v. Jackson*, 10 Hare, 202. But if the donees take as tenants in common, unless the understanding can be shown to have existed between the testator and all the donees, the trust will be enforced *pro tanto* against those only who were parties to the understanding. *Tee v. Ferris*, *supra*; *Rowbotham v. Dunnnett*, *supra*; see also *Carter v. Green*, 3 Kay & J. 591, 603; *Moss v. Cooper*, 1 J. & H. 352. — Ed.

HAIGH v. KAYE.

IN CHANCERY, BEFORE SIR W. M. JAMES AND SIR G. MELLISH, L.JJ.,
APRIL 18, 29, 1872.

[*Reported in Law Reports, 7 Chancery Appeals, 469.*]

THIS was an appeal from a decree of the Master of the Rolls.

On the 8th of December, 1860, the plaintiff, G. A. Haigh, conveyed a freehold estate, called the Thorncliffe estate, to the defendant, Robert Kaye, in consideration of the sum of £850.

Although that sum was expressed in the deed to be paid by the defendant to the plaintiff, the money was in fact the plaintiff's money, and he handed it to the defendant in order that it might be repaid as the nominal consideration for the conveyance. Under these circumstances the plaintiff alleged that the estate was conveyed to the defendant as a trustee for him.

On the 23d of November, 1867, disputes having arisen between the plaintiff and defendant, an agreement was signed by them to refer all matters in dispute respecting the transfer of the Thorncliffe estate and other money transactions to arbitration; but the defendant subsequently withdrew from the arbitration and no award was made.

The plaintiff having applied to the defendant to reconvey the estate, and the defendant having refused, the plaintiff filed his bill praying that the defendant might be declared to be a trustee for the plaintiff of the Thorncliffe estate, and might be directed to convey it to him.

The defendant in his answer said as follows:—

“Near the end of the year 1860 the plaintiff, who is my brother-in-law, being a party to the suit of *Haigh v. Haigh*, then pending in this Honorable Court, and fearing an adverse decision in such suit, made overtures to me for the sale of the said estate; but I was unable at that time to withdraw from my business the money required to pay for the purchase thereof. The plaintiff had previously, as I believe, attempted to sell the said estate to another person, who, however, declined to give more than £600 for it. The plaintiff then, being desirous to sell the said estate for the reasons above referred to, and being also desirous that I should purchase such estate, and that the same should be vested in me (but not, save as appears by this my answer to the statements contained in other parts of it to which I refer, as trustee for the plaintiff), induced me to take a conveyance thereof, it being understood that I should account to the plaintiff for the rents and profits until such time as I could make arrangements for purchasing or paying the purchase-money for the property; and, in fact, by a deed

bearing date on or about the 8th day of December, and in consideration of the sum of £850 therein expressed to have been paid by me to the plaintiff, the plaintiff did convey the said estate to me, my heirs and assigns. . . . I admit that it was intended that I should convey the estate to the plaintiff when he should desire me to do so, unless arrangements were completed for the purchase or payment of the purchase-money by me, and that in the meantime I should, until such arrangements were finally made, account to the plaintiff for the rents and profits of the property."

The defendant also stated as follows:—

"The rents and profits of the said Thorncliffe estate have been received by me since the date of the said conveyance, and I have accounted to the plaintiff for the same, or at all events for the amount thereof up to the 3d of February, 1863, when the arrangements for purchasing the property and paying the purchase-money therefor were finally settled."

The defendant also alleged that he had expended several hundred pounds of his own money on repairs and improvements on the property. He now claimed to hold the estate as his own, discharged from any trust for the plaintiff; and he claimed the benefit of the Statute of Frauds.

In his affidavit in support of his case the defendant said: "On the 3d of February, 1863, the arrangement for my purchasing the Thorncliffe estate was completed by my agreeing to pay, and by the plaintiff agreeing to accept, the sum of £800 for such estate. It was arranged between us that this sum should be paid by instalments, as I could spare the money from my business. I paid the full amount of such purchase-money by instalments between the 11th of February, 1863, and the 29th of January, 1867. I also paid divers sums of money to various persons by the order and direction of the plaintiff; and for other moneys due to me on the settlement of account with the plaintiff I take credit."

The Master of the Rolls declared that the defendant was a trustee of the Thorncliffe estate for the plaintiff, and ordered an inquiry what sums had been received by the defendant on account of the rents and profits, and of his application thereof, and also what sums had been properly expended by him in permanent improvements on the estate, or in the management thereof, and declared that the defendant had a charge on the estate for the amount (if any) which was due to him; and he ordered that, without prejudice to the lien, the defendant should convey the estate to the plaintiff.

The defendant appealed from this decree. After the institution of the suit the defendant G. A. Haigh died, and the suit was revived by his son, the present plaintiff.

Sir R. Baggallay, Q. C., and Mr. C. Hall, for the appellant. We contend, in the first place, that if the conveyance was meant to be in trust for the plaintiff, it was fraudulent and void as being for the purpose of evading the effect of the expected decision in the pending suit. Where a conveyance has been made for an illegal purpose the court will give no relief except in cases where there has been a mistake or misapprehension. *Birch v. Blagrove*; ¹ *Davies v. Otty*; *Childers v. Childers*.²

In the second place, we rely upon the Statute of Frauds. No trust was declared in writing at the time, and we claim to hold the Thorncliffe estate discharged from any trust. It is true that the defendant admits in his answer that he was to hold it for a certain time in trust for the plaintiff; but a defendant may admit a parol trust, and at the same time take advantage of the Statute of Frauds. Mitford on Pleading (5th ed.) p. 310.

[*SIR W. JAMES, L.J.* Lord Redesdale is there speaking of a parol contract. Has that rule ever been applied to a parol trust?]

There is no distinction in the statute between a contract and a trust. If a plaintiff can evade the statute by interrogating the defendant, the statute would have very little operation. The only exception in the Statute of Frauds is in favor of resulting trusts. A resulting trust arises in two cases: first, where a man purchases in the name of another there is a resulting trust for the purchaser; secondly, where a trust is declared of part of an estate there is a resulting trust as to the rest. But no resulting trust is raised merely because there is a conveyance without any consideration. Saunders on Uses (5th ed.) p. 356; *Lloyd v. Spillet*.

Mr. Fry, Q. C., and Mr. T. C. Wright, for the plaintiff, were not called on.

SIR W. M. JAMES, L.J. I am of opinion that the decree of the Master of the Rolls must stand.

The defendant admits that there was a conveyance given to him purporting to be executed in consideration of £850 paid by him to the original plaintiff, G. A. Haigh, by which he became, by purchase, owner of the estate. He admits that there was no such transaction in fact as any sale to him, but that the payment of the £850 was a mere form, and that the plaintiff paid the expenses of the conveyance to him, or gave him the money to pay them. That being so, he goes on to admit that he was to hold the estate upon trust to pay the rents and profits to the plaintiff, and when the plaintiff called upon him for a reconveyance he was to reconvey it. The plaintiff has called upon him to reconvey the estate, and he suggests by way of answer to that, first of all vaguely and faintly, that this transaction was not altogether a straight-

¹ Amb. 264.

² 1 De G. & J. 482.

forward transaction; that this transaction was entered into with a view to defraud somebody else. The defendant says in effect, "I am to remain in possession of the estate, because we were both of us engaged in a transaction contrary to the law, and you will not take it away from me to give it to a man who was as bad as I was in the matter; in fact it was an illegal and fraudulent transaction against somebody else, and where there is an equal crime the court ought to hold that *in pari delicto melior est conditio possidentis*." However the defendant has not raised that defence in the way in which, according to my judgment, such a defence ought to be raised. If a defendant means to say that he claims to hold property given to him for an immoral purpose, in violation of all honor and honesty, he must say so in plain terms, and must clearly put forward his own scoundrelism if he means to reap the benefit of it. Here he has simply said that the plaintiff, fearing an adverse decision in the suit of Haigh v. Haigh, conveyed the property to him. I think that is not sufficient.

The next objection taken was upon the Statute of Frauds. The defendant admits that he took the estate upon the most positive agreement to return it; but in another part of his answer he sets up the Statute of Frauds, and claims the estate as a right. Now the Statute of Frauds no doubt says that a person claiming under any declaration of trust or confidence must show that in writing; but the statute goes on to say that no resulting trust, and no trust arising from operation of law, is within that enactment. I apprehend it is clear that the Statute of Frauds was never intended to prevent the court of equity from giving relief in a case of a plain, clear, and deliberate fraud. The words of Lord Justice Turner, in the case of *Lincoln v. Wright*,¹ where he said: "The principle of this court is that the Statute of Frauds was not made to cover fraud," express a principle upon which this court has acted in numerous instances, where the court has refused to allow a man to take advantage of the Statute of Frauds to keep another man's property which he has obtained through fraud. It is difficult to distinguish this case from that of *Childers v. Childers*.² It is consistent entirely with *Davies v. Otty*, which does not seem to me to carry the matter at all further than the decision of Lord Justice Turner in *Lincoln v. Wright*, where the Statute of Frauds was attempted to be set up in the same way by a man who claimed to take under an absolute conveyance instead of a mortgage.

That being so, the Statute of Frauds and the ground of supposed illegality of the whole transaction being set aside, the defendant comes into possession of this property as a trustee for the plaintiff. Then he says that although he was made a trustee there was a talk about his becoming the purchaser. He does not pretend to say that at that time

¹ 4 De G. & J. 16.

² 1 De G. & J. 482.

there was any bargain, but he says that it was understood, before he was called upon to reconvey the property, that if he could make an arrangement to purchase it he was to have it.

[His Lordship then referred to the statements in the defendant's answer, and to the evidence on this subject, and continued.]

There is no direct evidence in writing in support of the defendant's contention, and it appears to me that the correspondence which passed between the plaintiff and defendant with reference to the arbitration is inconsistent with the existence of any such agreement. I am of opinion that the plaintiff has failed to prove his case, and therefore that the decree is quite right in declaring that he is to be treated as a trustee of the property, and must reconvey it to the representatives of the original plaintiff.

SIR G. MELLISH, L.J. I am of the same opinion.¹

¹ Symes v. Hughes, L. R. 9 Eq. 475, *accord*.

But see Bartlett v. Bartlett, 14 Gray, 277; Graves v. Graves, 29 N. H. 129; Ownes v. Ownes, 23 N. J. Eq. 60 (*semble*); Jackson v. Garnsey, 16 Johns. 189; Rasdall v. Rasdall, 9 Wis. 379; in which cases it was decided that a debtor who conveyed real estate to another to place it beyond the reach of his creditors, and upon an oral understanding that the grantee should hold the property for the benefit of the grantor, could not enforce the performance of the trust. In Rasdall v. Rasdall, *supra*, Paine, J., said, p. 385: "There is no doubt that, if any fraud had been alleged, by means of which the defendant procured the conveyance from his brother to himself, or any mistake by which the instrument was made absolute, instead of expressing the trust intended, parol evidence would have been admissible to show such fraud or mistake. . . . But no such fraud or mistake is alleged here. On the contrary, it appears from the whole tenor of the complaint, that the conveyance was made by Abel Rasdall, upon his own motion, and without any solicitation or instigation of the defendant, and that it was intended to be, as it is, absolute on its face. The only fraud alleged, therefore, is that of the defendant's now claiming the property in violation of the parol trust; and whether that constitutes such a fraud as will justify a court of equity in overturning the written contract of the parties, upon parol evidence, is the question presented. . . . Placing the relief, in such case, upon the ground of fraud, is implied by admitting that the parol evidence cannot be admitted to establish the trust for the purpose of enforcing it directly as a trust. And this is also expressly admitted. But it seems apparent to my mind that to say, in such a case, it shall be admitted to establish the fraud, is equally a violation of the statute. Because the fraud consists only in the refusal to execute the trust. The court cannot, therefore, say that there is a fraud, without first saying that there is a trust. And the parol evidence, if admitted, must be admitted to establish the trust, in order that the court may charge the party with fraud in setting up his claim against it. . . . Such a course does not relieve the court from the charge of violating the statute, but subjects it to the odium of an attempted but unsuccessful evasion."

See further Lingenfelter v. Ritchey, 52 Pa. 485; Blogdett v. Hildreth, *supra*, p. 264, and cases cited, p. 265, n. 7; Baldwin v. Campfield, 4 Halst. Ch. 891. -- ED.

RIORDAN v. BANON.

IN CHANCERY, IRELAND, BEFORE RT. HON. HEDGES E. CHATTERTON,
V. C., NOVEMBER 16, DECEMBER 4, 1871.

[*Reported in Irish Reports, 10 Equity, 469.*]

THE VICE CHANCELLOR.¹ The bequest which forms the subject of the contention argued upon this hearing is in these words: "I give and bequeath to John White £2,000, to be disposed of by him in a manner of which he alone shall be cognizant, and as contained in a memorandum which I shall leave with him." Its terms show that it was not a gift to Mr. White for his own absolute use, and he, by his answer, disclaims any beneficial interest in it. He states that the testator, before making his will, informed him of his wish to provide a sum of £2,000 for the lady whom he named; that he would not wish to mention her name in his will; and that he was anxious, if Mr. White did not object, to leave that sum to him, so that he might pay it to her after the testator's death. To this Mr. White assented, and promised to carry out the testator's wishes. The testator also told Mr. White that he would leave or write a letter or memorandum containing his directions to Mr. White, but only as a precaution, lest Mr. White should die in the testator's lifetime. Mr. White further states that some time afterwards, and in or about July, 1874, the testator brought his will and the letter he had mentioned to Mr. White's house, read to him the will, or part of it, and this letter; sealed both up, and left them with him; and that he, Mr. White, retained them till the testator's death. Under these circumstances, the question arises, Who is beneficially interested in this sum? It is conceded that Mr. White is a trustee of it; but the controversy is whether he is to take it in trust for the lady or for the residuary legatees. For the latter, it is submitted that this was an endeavor on the part of the testator to evade the Wills Act, and to reserve to himself a power of future testamentary disposition by parol, or by an instrument which might not be, and in the event was not, executed as prescribed by that statute. The law on this subject is not in a very satisfactory state, as the cases appear in some respects to differ in principle. The decisions on the Statute of Frauds relating to wills are equally authorities upon this question, though it arises under the subsequent act. There are two distinct classes of cases on the subject: one, where no trust is disclosed on the face of the will, and the other where a trust appears, but the will does not disclose what the intended trust is, or only does so imperfectly. In the former, it was

¹ See *supra*, p. 79, n. 1. — Ed.

settled at an early period, that if, by the admissions of the apparent devisee or legatee, or by other sufficient proof, it was established that the gift was made to him in trust, equity fastened on his conscience and compelled him to give effect to such trust, and that a statute which was made to prevent frauds should not itself be turned into an engine of fraud. Such trusts, too, were enforced, not for the benefit of the heir-at-law, next of kin, or residuary devisee or legatee, but for the persons for whose benefit the secret trust was intended, — provided always that it was lawful.

But the difficulty arises when, as in the present case, the will does disclose an intended trust, but does not do so perfectly. In such cases the same kind of fraud cannot operate, as the will itself shows that the legatee or devisee cannot claim for his own benefit. It becomes, therefore, necessary to consider whether he takes for the benefit of the intended *cestui que trust* or for the residuary legatee, or devisee, if any, and if not, for the next of kin or heir. It is here that the cases appear to differ. So early as the year 1688, in the case of *Crook v. Brooking*,¹ where there was a gift by will to two persons named, to be by them disposed of on such secret trust as the testator had privately revealed to one of them, and the trust was admitted in a letter from one of those persons to the other, it was held by Jefferies, L. C., that the trust was well and sufficiently declared by the letter, and the legacy was given to the *cestui que trusts* so appearing. In that case it appeared by the will that the trust, whatever it was, had been communicated to one of the trustees before the will. The cause was reheard before the Lords Commissioners, and the trust again given effect to, though the decree was varied on another point.

In the case of *Pring v. Pring*, also reported in 2 Vern. p. 99, the gift was to the executors in trust, a legacy being also given to them not clothed with a trust; and the testator's widow filed her bill, alleging that the testator intended and had declared that she should have the benefit of his personal estate, and had made the defendants executors in trust for her. Two of the executors admitted this trust, but the third denied it. It was contended that though the will called them executors in trust, yet it was not said for whom the trust was, and that therefore it should be taken to be a trust for all who could come in under the Statute of Distributions: but the court held that, as the will declared that the executors were only in trust, and not declaring for whom, the person might be averred; and decreed the trust for the plaintiff. There it does not appear whether the trust had been communicated to the executors before or after the making of the will. In *Smith v. Attersoll*,² before Lord Gifford, M. R., the testator left personal estate to his executors, "in trust for certain purposes which have been fully

¹ 2 Vern. 107.

² 1 Russ. 266.

explained to them." On the same day, the executors signed a paper stating what those purposes were, to which the testator afterwards added a further direction in his own handwriting, but not signed by either him or the executors. The bill was filed by one of the parties mentioned in the paper to carry out the trusts contained in it, and the executors admitted the trusts; but they contended at the hearing that the paper was testamentary, and that, as it had not been admitted to probate, regard could not be had to it. Lord Gifford held that the paper was not to be considered as testamentary, but might be received as evidence against the executors of the nature of the trusts on which the property was held by them. He relies on the fact that the paper was not signed by the testator, but by the executors; and he declined to consider whether the case of *Inchiquin v. French*,¹ relied on for the plaintiff, could be carried so far as to hold that a paper signed by the testator himself, explanatory of the trusts of a legacy, could be regarded as a declaration of trust, and not testamentary. He says: "If they (the executors) had not signed any such paper, and it had been put to their consciences whether the legacy was not given to them upon trust for these children, their declaration or admission of those trusts, upon oath in their answer, would have been evidence against them, and would have entitled the plaintiff to the assistance of this court." He therefore held that the children were entitled to the shares in question, not as legatees, but as *cestui que trusts*. The same question was reconsidered by him on further argument, in reference to the effect of the lines added by the testator in his own writing, and, after reviewing the cases, and especially relying on the authority in *Crook v. Brooking*, he expressed the same opinion. In *Podmore v. Gunning*,² the testator left his real and personal estate absolutely to his wife, adding these words: "Having a perfect confidence that she will act up to those views which I have communicated to her in the ultimate disposal of my property after her decease." Sir L. Shadwell, V. C., expressed his opinion that, if the plaintiffs had established in evidence the facts they relied on, namely, that the testator had, at the time of making his will, directed his wife to give the property, after her death, to the plaintiffs, and that she had promised to do so, they would have been entitled to a decree establishing the trust for them. The plaintiffs having failed in this proof, the question was not actually decided. These cases, therefore, decide that, when the will discloses that a trust was intended by the testator to be attached to a devise or bequest, it is open to the parties intended to be benefited thereby to prove, either by the admission of the devisee or legatee named, or by parol evidence, that such trust was in fact disclosed by the testator to such devisee or legatee, and accepted by him. I next come to consider the case of

¹ 1 Cox, 1.² 7 Sim. 644.

Johnson v. Ball, which it is difficult to reconcile with the preceding. There the testator, before making his will, informed two persons that he was about to make it, and that he intended to leave a certain policy of insurance upon trust for the plaintiff and her children, and asked them to act as trustees for the children, which they consented to do. Some time afterwards, the testator made his will, and left the policy to those persons, "to hold upon the uses appointed by letter signed by them and myself." No such letter appears to have been ever written, but the testator subsequently made a memorandum stating the way in which he wished the policy left to those persons to be divided. This memorandum he signed, and handed to one of the trustees to be signed by him and the other trustee, and retained by them. The trustees admitted the trust and supported the plaintiff's claim. Parker, V. C., decided against the trust. He held that it was impossible to give effect to the letter written after the will, as a declaration by the testator of the trusts on which he had bequeathed the policy to his trustees. He proceeded as follows: [His Lordship read passages from the judgment in that case.] When he says that the trustees had no interest in the policy which enabled them to admit a trust, for that, by reason of the supposed resulting trust for the residuary legatees, they could not create any other trust, he seems certainly to differ from the opinions of the judges who decided the cases I have before mentioned. In *Pring v. Pring* the very contention was raised that the executors were trustees for the next of kin, and yet the admission of the executors was received and acted on. His Honor professed to distinguish the case before him from those I have referred to, on the ground that, in them, the will referred to a trust created by the testator by communication with the legatee, antecedently to or contemporaneously with the will. But, even if the distinction be well founded, there was proof in the case before him that the testator had, before the making of his will, communicated to his intended legatees in trust that his intention was to leave the policy upon trust for Mrs. Johnson and her children. In *Moss v. Cooper*,¹ Wood, V. C., takes a distinction which is very intelligible, between the cases in which the testator's intention is communicated to the legatee and those in which no such communication takes place. He says, p. 366: "I apprehend that, to fasten any trust upon an absolute bequest of property, it is necessary to prove knowledge on the part of the legatee of the intended trust, and acquiescence, either by words of consent or by silence, when the intention is communicated to him. If you attempt to raise a trust out of some uncommunicated intention, you contravene the express provisions of the statute, by varying the dispositions of the will by parol evidence. I have held in two cases that you cannot, by parol evidence, deprive a legatee of a

¹ 1 J. & H. 253.

benefit given to him by a will, where there is no obligation — expressly or impliedly — accepted by him, and no communication made to him; for, if you did, you might adduce parol evidence in any case that an estate given to A. was really meant for B. Parol evidence, therefore, is not admissible unless communication of the testator's intention is established." He further held that it is altogether immaterial whether the promise of the legatee to perform the trust is made before or after the execution of the will, with one distinction, which has no bearing on the present case. The trust in that case was altogether secret, the legacy being apparently absolute; but the principles there enunciated appear to me to apply equally to cases where the will shows that the legacy was to be in trust, without disclosing the trust.

The result of the cases appears to me to be that a testator cannot by his will reserve to himself the right of disposing subsequently of property by an instrument not executed as required by the statute, or by parol; but that when, at the time of making his will, he has formed the intention that a legacy thereby given shall be disposed of by the legatee in a particular manner, not thereby disclosed, but communicated to the legatee and assented to by him, at or before the making of the will, or probably, according to *Moss v. Cooper*, subsequently to the making of it, the court will allow such trust to be proved by the admission of the legatee, or other parol evidence, and will, if it be legal, give effect to it. The same principle which led this court, whether wisely or not, to hold that the Statute of Frauds and the Statute of Wills were not to be used as instruments of fraud, appears to me to apply to cases where the will shows that some trust was intended, as well as to those where this does not appear upon it. The testator, at least when his purpose is communicated to and accepted by the proposed legatee, makes the disposition to him on the faith of his carrying out his promise, and it would be a fraud in him to refuse to perform that promise. No doubt the fraud would be of a different kind if he could by means of it retain the benefit of the legacy for himself; but it appears that it would also be a fraud, though the result would be to defeat the expressed intention for the benefit of the heir, next of kin, or residuary donees.

To apply this to the present case, I must consider the facts proved by the admission and the evidence of Mr. White. He proves satisfactorily that, before the making of the will, the intended trust was communicated to him by the testator, and was accepted by him. The will was plainly made by the testator on the faith of Mr. White's promise to perform the trust. This was complete in itself, and would, on the principle which the cases appear to me to establish, constitute a valid trust for the lady. There was no reservation of a future disposition of a testamentary character, but a communication, which, if ac-

accompanied by a transfer to Mr. White by act *inter vivos* of the subject of the gift, would have been a present perfect trust. There is, therefore, an element which would supply what Parker, V. C., seems to have considered wanting in *Johnson v. Ball*. The testator also informed Mr. White that he would leave with him a paper containing the same directions in writing; but he added that it would be only as a precaution against Mr. White's dying in his lifetime. He did leave with him such a paper, but it has not been admitted to probate, and cannot be looked at as a testamentary disposition. There is no proof that it existed before the making of the will. The will refers to such a paper, but in terms which leave it doubtful whether it was already written or was to be thereafter written. The words of futurity in the will as to this paper, point not to the writing of the paper, but to the leaving it with Mr. White. The words, "in a manner of which he alone shall be cognizant," may fairly mean, "which I shall not communicate to any one else," and thus be consistent with the undoubted evidence of Mr. White, that the testator had previously made the communication to him. I am, accordingly, of opinion that this is a valid legacy to Mr. White in trust for the lady named by the testator.¹

THOMAS LANTRY *et al.* v. BERNARD M. LANTRY.

IN THE SUPREME COURT, ILLINOIS, SEPTEMBER TERM, 1869.

[*Reported in 51 Illinois Reports, 458.*]

APPEAL from the Circuit Court of La Salle County, the Hon. Edwin S. Leland, Judge, presiding.

This was a suit in chancery instituted in the court below, by Bernard M. Lantry against Thomas Lantry and John Twohey, to enforce an alleged parol trust. The circumstances attending the conveyance out of which the controversy arises are set forth in the opinion of the court.

The court below entered a decree declaring the existence of the trust, and enforcing its execution. The defendants thereupon took this appeal.

The principal question in the case arises on this state of facts: John Lantry, in his lifetime, conveyed by deed absolute in form, a tract of land to his brother, Thomas Lantry, the latter in no way procuring the conveyance to be made. The complainant, Bernard, a son of the

¹ *Crook v. Brooking*, 2 Vern. 50, 106; *Pring v. Pring*, 2 Vern. 99; *Smith v. Atter-soll*, 1 Russ. 266; *Carter v. Green*, 3 K. & J. 591; *Re Fleetwood*, 15 Ch. D. 594, *accord*.

See also *Inchiquin v. French*, Amb. 33; 1 Cox, 1, s. c.; *Methan v. Duke of Dover*, 1 P. Wms. 529; and *Lewin, Trusts* (7th ed.), 60, 61. — ED.

grantor, alleges there was a parol agreement on the part of the grantee to hold the land in trust for him, and seeks to have such alleged trust enforced.

Messrs. Bushnell and Avery, for the appellants.

Mr. Oliver C. Gray, for the appellee.¹

MR. JUSTICE LAWRENCE delivered the opinion of the court.

The courts have gone a long way towards repealing the Statute of Frauds, but we think not far enough to sustain the decree rendered in this case.

The facts are very brief. The appellee, Bernard M. Lantry, was the son of John Lantry, deceased, by a divorced wife. He was born soon after the divorce, and never lived with his father. In the fall of 1859, John Lantry, anticipating his own speedy decease, conveyed to his brother, Thomas Lantry, his farm of eighty acres, by an absolute deed. Thomas Lantry swears there was no money consideration paid for the deed, but his brother expected to be taken care of, as he was ill, and told Thomas, in reply to a question whether the boy was not to have something, to do as he pleased. "If the boy is worthy, give him what you please; if not, never look at him." Thomas has given appellee \$320 with which to purchase a team. On the other hand, various witnesses testify that John Lantry, before he went from La Salle County, where he resided, to his brother's house at Chicago, expressed the intention of deeding the farm for the benefit of the boy, and applied to one or two of them to take the trust. Some admissions, rather general in their character, are also proven against Thomas Lantry.

The fourth section of the Statute of Frands is as follows: —

"All declarations or creations of trusts or confidences, of any lands, tenements, or hereditaments, shall be manifested and proved by some writing, signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void, and of no effect: *Provided*, that resulting trusts, or trusts created by construction, implication, or operation of law, need not be in writing, and the same may be proved by parol."

It is not pretended that the alleged trust in this case is a resulting trust, or one created "by construction, implication, or operation of law." It is clearly within the language of the act, and is not denied to be so, but it is said this is one of those cases in which courts decline to apply the statute, because to do so would protect a fraud. There is a large number of cases of this character. Those which most nearly approach the case at bar are cited in Hill on Trustees, p. 151, notes, 3d Am. ed., and in 1 Story's Eq. Jur. § 256, 8th ed. The same cases are cited by both authors, and also by the counsel for appellee. The text in Hill, in support of which the cases are referred to, is as follows:

¹ The arguments of counsel are omitted. — ED.

“Where a person, by means of his promises, or otherwise by his general conduct, prevents the execution of a deed or will in favor of a third party, with a view to his own benefit, that is clearly within the first head of frauds, as distinguished by Lord Hardwicke, viz. : that arising from facts or circumstances of imposition; and the person so acting will be decreed to be a trustee for the injured party, to the extent of the interest of which he has been thus defrauded.”

The language of Story, *ubi supra*, is as follows: “In the next place, the fraudulent prevention of acts to be done for the benefit of third persons. Courts of equity hold themselves entirely competent to take from third persons, and *a fortiori* from the party himself, the benefit which he may have derived from his own fraud, imposition, or undue influence, in procuring the suppression of such acts.”

It will be observed, the language of these authors is carefully confined to cases where the party against whom the parol trust is established has prevented the grantor, by fraudulent promises, from adopting some other mode of accomplishing his purpose which he was about to adopt, and induced him to place it in the power of such party to convert the property to his own use. This is the exact limit of the cases cited. Thus, where a husband of the tenant in tail in remainder, by force and management, prevented the tenant in tail *in esse*, who was on his deathbed, from suffering a recovery for the purpose of providing for other parties out of his estate by will, Lord Thurlow held the estate was to be considered as if the recovery had been suffered. *Luttrell v. Olmins*.¹

So where the issue in tail promised his father, the tenant in tail, to provide for the younger children out of the estate, and thereby prevented his father from suffering a common recovery for that purpose, equity will compel a performance of the promise. *Devenish v. Baines*.² So where an heir or residuary legatee prevents a gift of a legacy by promising to pay it. *Chamberlaine v. Chamberlaine*; ³ *Oldham v. Lichfield*; ⁴ *Mestaer v. Gillespie*; ⁵ *Thynn v. Thynn*; ⁶ *Podmore v. Gunning*.⁷

It will be observed that in all these cases there is something more than the mere receipt of the title to real estate, with a parol promise to hold it, subject to a trust. There is an interference with the owner of the property, by means of which he is induced to forego the execution by himself of his designs for the benefit of a third person, and to leave the execution to the party deluding him by a false promise, and through such false promise obtaining title to the property.

The cases are reviewed by Chief-Justice Gibson, in *Hoge v. Hoge*,⁸

¹ 11 Ves. 438, and 14 Ves. 290.

² Prec. Ch. 4.

³ 2 Term, 34.

⁴ 2 Vern. 506.

⁵ 11 Ves. 638.

⁶ 1 Vern. 296.

⁷ 7 Sim. 644.

⁸ 1 Watts, 213.

and the rule is laid down, that in order to create the trust, there must have been some fraud, active or passive, in procuring the deed or devise — the mere breach of a promise to convey is not sufficient.

So in *Perry v. McHenry*,¹ this court said: "If the refusal to comply with a parol agreement constitutes such a fraud as to take a case out of the statute, then no case is within it; for a party has only to allege that a person contracting by parol fraudulently refuses to comply with the terms of his parol agreement, which he must do in every case, or there would be no necessity for resorting to a court of equity to enforce it, and a case is made to which the statute does not apply."

The distinction is this. If A. voluntarily conveys land to B., the latter having taken no measures to procure the conveyance, but accepting it, and verbally promising to hold the property in trust for C., the case falls within the statute, and chancery will not enforce the parol promise. But if A. was intending to convey the land directly to C. and B. interposed and advised A. not to convey directly to C. but to convey to him, promising if A. would do so, he, B., would hold the land in trust for C., chancery will lend its aid to enforce the trust, upon the ground that B. obtained the title by fraud and imposition upon A. The distinction may seem nice, but it is well established. In the one case B. has had no agency in procuring the conveyance to himself. In the other he has had an active and fraudulent agency. In the one case he has done nothing to prevent a conveyance to the intended beneficiary. In the other he has by false promises diverted to himself a conveyance about to be made to another.

Giving to the evidence all that can be claimed for it, the present case only comes in the first category. There is not a particle of evidence tending to show that Thomas Lantry ever uttered a word to induce the conveyance from his brother to himself, or to prevent a conveyance from his brother to appellee. On the contrary, the evidence indicates that John Lantry at no time intended a conveyance directly to his son; and conceding to the evidence its utmost effect in favor of appellee, it appears that John Lantry went to Chicago and asked his brother to accept the trust.

But, apart from the difficulty created by the statute, the evidence is extremely unsatisfactory, and the rule is, that even in that class of cases in which a trust can be established by parol, such evidence is not regarded with favor, and the court will not act upon it if it be not strong and irrefragable, or if it be contradicted by other testimony. *Hill on Trustees*, 187, and cases cited in notes. The evidence in this case shows merely what intentions John Lantry expressed before he went to Chicago — which he may have wholly changed — and some very indefinite statements testified, by one witness, to have been after-

¹ 13 Ill. 236.

wards made by Thomas Lantry. There is no direct evidence that he ever made even a parol promise to hold the property in trust, and he denies, in his own testimony, that he ever did.

To the account put in evidence showing his expenses in regard to the land we can attach no material consequence. It is consistent with his own statement that the land was deeded to him by his brother to be used, so far as he might deem advisable, for the benefit of the boy, and no further.

The decree must be reversed and the cause remanded.

*Decree reversed.*¹

PATRICK WALL AND OTHERS v. WILLIAM HICKEY AND
ANOTHER.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, MARCH, 1873.

[Reported in 112 Massachusetts Reports, 171.]

BILL in equity, brought by the children of Patrick Wall against their uncles William and Timothy Hickey, alleging that Patrick Wall being seised in fee of a parcel of land in Dorchester conveyed it by mortgage to one Patrick Norton; that it was afterwards sold to one Hannah Clarkson for seven hundred dollars under a power of sale contained in the mortgage; that the land was worth at least thirty-five hundred dollars; that Wall tried to repurchase the land, but that Clarkson refused to sell to him at any price, but agreed that if parties could be found who would pay her a bonus, and take the property and hold it in trust for Wall's minor children, she would convey the premises to such parties upon such conditions; that thereupon Wall applied to William Hickey and Timothy Hickey, who were brothers of Wall's deceased wife, and uncles to his minor children, and asked them if they would advance the necessary sum to buy the property from Clarkson, and take a deed of it in trust for their nephews and nieces; that the Hickeys agreed to advance the necessary funds and hold the property upon such trust; that in pursuance of this agreement, Clarkson, the Hickeys, and Wall proceeded to an attorney's office in Boston for the purpose of carrying out these arrangements and executing the necessary deeds; that a deed was then drawn conveying the premises in fee from Clarkson to the Hickeys and executed by her; that the attorney, after

¹ In *Ratliff v. Ellis*, 2 Iowa, 59; *Philbrook v. Delano*, 29 Me. 410; *Perkins v. Chairs*, 2 Baxt. 194, the court declined to enforce an express oral trust, in favor of a third person, regarding the evidence insufficient to show that any fraud was practised by the grantee upon the grantor. — Ed.

inquiring of the parties on what terms the Hickeys were to hold the premises, noted down in a book, used by him for making minutes of the real estate transactions of his office, memoranda of a declaration of trust, which he read over to the parties, and to which they all assented, and which the Hickeys agreed to sign; that this declaration of trust was as follows:—

“Declaration of Trust. William Hickey and Timothy Hickey, as to estate conveyed by Hannah Clarkson. To manage same, keeping in good repair, &c., and from proceeds of rents repay to themselves the sum of paid for the premises, with interest thereon semi-annually at $7\frac{3}{10}$ per cent, and thereafter hold the same for the benefit of Mary Ann McNally, wife of Hugh McNally, Ellen Wall, Michael Wall, Timothy Wall, and Honora Wall, children of Patrick Wall, and Mary Hickey, deceased; and upon youngest of said children reaching twenty-one years, to make over the whole estate to said Mary, Ellen, Michael, Timothy, and Honora in equal portions, discharged of trusts, and meanwhile pay the net income to them in equal shares, except, in the case of the minors, they shall apply such portions of their share of said income as they may think proper to their maintenance; and the balance, if any, keep safely invested, and pay over the same on their reaching their twenty-first year, respectively; the children of either of said parties who may have died to take their parents’ share.”

The bill then alleged that the Hickeys, having paid Clarkson the sum agreed upon, were permitted to take the deed, they agreeing to execute a declaration of trust according to the memoranda when they should be extended, and at the same time to record both the deed and the declaration of trust; that with this understanding the parties separated; that shortly afterwards the attorney wrote out a declaration of trust in accordance with the memoranda, and it was taken to the Hickeys; whether the Hickeys ever executed it or not the plaintiffs were unable to say, “but the records showed that the declaration of trust had never been recorded,” and the Hickeys claimed to hold the premises in fee-simple, and unincumbered with any trust; that the plaintiffs supposed that the Hickeys held the premises in trust for the children of Wall, since he was permitted to occupy a part of them together with his children, without rent, for nearly two years; but that the Hickeys had since demanded and collected rent of Wall, and claimed to hold the premises in fee.

The bill prayed that the defendants might be restrained from alienating or incumbering the premises; that they might be ordered to execute a declaration of trust, and render an account of rents and profits, and for general relief. The defendants demurred to the bill, and the case was reserved by Morton, J., upon the bill and demurrer, for the consideration of the whole court.

P. E. Tucker and H. E. Ware, for the defendants.

S. C. Darling and G. H. Tripp, for the plaintiffs.

WELLS, J. The transaction, as it was intended by the parties engaging in it, was to create an express trust in favor of these plaintiffs, to be declared in writing. That purpose was carried into effect, so far as that a deed of the land to the trustees selected was executed by Clarkson, the money which she was to receive advanced by the defendants, and the terms of the trust arranged and agreed upon. The business was left unfinished at this point, in order that the memoranda of the terms of the trust might be extended in a formal instrument for the defendants to sign. The defendants were permitted to take the deed from Clarkson, upon agreeing to execute a declaration of trust according to the memoranda, when the same should be written out and presented to them, and then to record both the deed and the declaration of trust together. The formal declaration of trust having been prepared and handed to the defendants in due time, they have failed to sign and record it, but have recorded the deed without the declaration, and now undertake to hold the property in fee-simple, unincumbered of the trust.

These facts, admitted by the demurrer, show that there never was any such delivery of the deed as would entitle the defendants to hold it, without complying with the condition upon which they were permitted to take it into their manual possession. It was a conditional delivery only. *Mills v. Gore*; ¹ *Chandler v. Temple*; ² *Wheelwright v. Wheelwright*; ³ *Maynard v. Maynard*.⁴ The attempt to take advantage of that permission by recording the deed, and to disregard the condition on which alone the defendants received it, was a breach of good faith, and a fraud in equity, if not so at law. Against such fraud equity will relieve, by intercepting the legal title in the hands of the parties who have thus unfairly acquired it, and either compelling them to release the property to the uses for which it was intended, or to hold it subject to the trust. Story Eq. §§ 330, 768; Browne on the Statute of Frauds, § 94. Kerr on Fraud and Mistake, 47-50 and notes; *Bartlett v. Pickersgill*; ⁵ *Dixon v. Parker*; ⁶ *Walker v. Walker*; ⁷ *Joynes v. Statham*; ⁸ *Washburn v. Merrills*; ⁹ *Daniels v. Alvord*; ¹⁰ *Brainerd v. Brainerd*.¹¹

The defendants rely for their protection upon the Statute of Frauds, and especially upon the provision which forbids the creation or declaration of trusts otherwise than by an instrument in writing. Gen. Sts. c. 100, § 19. But the ground of equitable jurisdiction and interference in this case is not the alleged agreement of the defendants to hold the

¹ 20 Pick. 28.

⁴ 10 Mass. 456.

⁷ 2 Atk. 98.

¹⁰ 2 Root, 196.

² 4 Cush. 285.

⁵ 1 Eden. 515.

⁸ 3 Atk. 388.

¹¹ 15 Conn. 575.

³ 2 Mass. 447.

⁶ 2 Ves. Sen. 219, 225.

⁹ 1 Day, 139.

property for the benefit of the plaintiffs. It is not the enforcement of a trust. The result may be to enforce a trust, or to give effect to an oral agreement concerning an interest in land. But that is incidental, and not as the foundation of the proceedings. Those are based upon the fraud of the defendants in improperly obtaining and recording the deed of the land. To defeat that fraud, the court set aside and vacate the deed. Having thus the authority over the subject matter, it is to be disposed of according to the equitable rights of the parties. The agreement of trust, and the other facts resting in parol evidence, are competent to disclose to the court those equities; and when they are ascertained they will be protected and secured by such means as may be adapted to the end.

If the defendants have already executed the instrument declaring the trust, it is competent for the court to order it to be surrendered to the plaintiffs, or placed on record for their benefit. *Pierce v. Lamson*.¹ Or they may be required to release the land for the use of the plaintiffs, with such provisions as the court may order for securing to them the repayment of the sum they have advanced.

It is sufficient, upon demurrer, that there is set forth in the bill an equitable ground for relief, within the powers of the court, and properly cognizable by it as a court of chancery. *Demurrer overruled*.²

¹ 5 Allen, 60.

² In *McKinney v. Burn*, 31 Ga. 295; *Cipperly v. Cipperly*, 4 Th. & C. 342; *Moyer v. Moyer*, 21 Hun, 67, an express oral trust was enforced in favor of a third person, on the ground of the fraud practised by the grantee upon the grantor.—Ed.

CHAPTER VI.

CONSTRUCTIVE TRUSTS.

SECTION I.

Where Property is acquired by One Person by the Wrongful Use of the Property of Another.

WILLIAM LANE, on the behalf of himself and the other Creditors of JOHN DIGHTON, deceased, and Another, Plaintiffs, v. ELIZABETH DIGHTON, Widow and Administratrix of JOHN DIGHTON, and Others, Defendants.

IN CHANCERY, BEFORE SIR THOMAS CLARKE, M. R., JANUARY 27, 1762.

[*Reported in Ambler, 409.*]

By indenture of 14th July, 1748, made after the marriage of John Dighton and the said Elizabeth, her fortune, which was personalty, and amounted to more than £8,000, was assigned to four persons upon trust, to pay the interest to him for life, and then to his wife for life, and the principal to their children, as they or their children should appoint; and, in default of appointment, to all of them. On the 24th January, 1754, Dighton bought at an auction an estate in Oxfordshire, called Sherborne-Woods, for £6,600, and made a deposit of £660; and there being some difficulty in adjusting a mortgage interest upon the estate, it was, by writing, agreed between him and the vendors, that he should lay out the remainder of the purchase-money, being £5,940, in three per cent bank annuities, in the names of certain persons, upon the trusts therein mentioned; and should thereupon be let into the possession of the estate, and should have a conveyance thereof as soon as conveniently could be. Mr. Dighton, accordingly, on the 8th May, 1754, laid out the money in the purchase of £5,711 4s. 6d. bank annuities; but not having sufficient of his own, he prevailed on the trustees to let him have £4,010 10s. of the trust money, to make up the £5,940. He was let into possession of the estate, and afterwards had a conveyance of it. He also bought another estate at Ascot, in Oxfordshire. He died intestate on 1st January, 1761. The bill was brought for payment of the debts, and to have the settlement made good out of the personal estate, and distribution of the residue. The widow and younger children, by their answer, said that part of the

trust money had been laid out in the purchase of Sherborne-Woods and Ascot estate, and ought to be considered as the trust money.

Proof was made by the defendants, from the books of Child the banker, with whom Dighton kept cash, and from the books of the South Sea Company, that, on the said 8th of May, 1754, Dighton, by letter of attorney from the trustees, sold £5,347 South-Sea annuities, which produced, after payment of brokerage, £4,010 10s.; also a paper, all of the handwriting of Dighton, being a calculation of his fortune, in which he takes notice that the trust stocks had been sold and the money laid out from time to time in the purchase of land and on mortgages, and that the only sum remaining in the trustees' names was a mortgage of £4,500 due from George Dacre, Esq.; so that there will be wanting £2,400 to make up the trust money.

The case came on to be heard on the 8th of May, 1761, by consent, before Sir Thomas Clarke, Master of the Rolls, when the question, Whether the estate can be charged with any part of the trust money? was debated. On the part of the plaintiff, James Lucy Dighton, it was argued by Mr. Capper, that if trustee lays out trust money in land, the court will charge the land with it, upon admission of the trustees, but will not receive evidence to prove it; for that would be contrary to the Statute of Frauds, which requires trusts of lands to be in writing, unless by operation of law. As, if land is bought in the name of A., evidence may be given that the purchase-money was paid by B.; that is a trust raised by operation of law; and the cases of *Kirk v. Webb*,¹ and of *Halcot v. Marchent*, 1701, were cited as authorities on the general principle. It was further said, that if evidence could be received, it ought to prove precisely in what land the money was laid out. That in this case it is only loosely said that the trust money was from time to time laid out in land. On the other side, it was argued by me, on the behalf of the defendants, that the evidence ought to be read, and that it is sufficient to ground an inquiry, if not to make an immediate decree. That there are cases of trust, though not expressly declared in writing, where the admission of the party is sufficient. *Ryal v. Ryal*, 2d February, 1739; *Warley v. Sawbridge*, in the Exchequer;² *Goryton v. Barnes*;³ *Symondson v. Tweed*.⁴ So if it appears in writing, though made for a different purpose. *Degg v. Degg*.⁵ That the true distinction is between evidence of facts and general evidence; the former ought to be received, the other not. Upon this ground, in the case of a purchase in the name of B., evidence may be given that A. paid the purchase-money. In *Kirk v. Webb*, the Master of the Rolls, who, with Powell, J., was called in to the assistance of Lord Somers, Chancellor, says,

¹ Prec. in Ch. 84.

² Easter, 4 Geo. II.

³ Prec. in Ch. 208.

⁴ Prec. in Ch. 374.

⁵ 2 Wms. 414.

If it had been plainly and expressly proved that the estate was bought with the profits of the trust money, he thought it might be otherwise. And in *Halcot v. Marchent*, the court said it was too hard for him, because there was no express proof of the application of the trust money. In *Ryal v. Ryal*, there was no express admission, but only that credit was given in account; and on that, the court sent the matter to inquiry by Master. What the court said upon that occasion is very material. His Honor, after taking time for consideration, on 8th June following, gave his opinion: The general question is, Whether the court can follow the trust money into land, consistent with the Statute of Frauds and Perjuries, and the cases determined upon it? It divides itself into two questions: 1st. Whether the evidence can be received; 2d. Whether it is sufficient, if received.

For the plaintiffs, were cited the cases of *Kirk v. Webb* and *Halcot v. Marchent*, and the reason upon which those cases were determined; that is, that there must be an express trust in writing to affect lands, and that evidence cannot be received. The only cases excepted in the statute are, operation of law and extinguishment; as, if A. buys land in the name of B., A. may prove that he paid the consideration, and there will be resulting trust for him; so where there is a declaration as to part of the land, the rest results.

On the other side was cited *Ryal v. Ryal*, in Ch. 4th February, 1739. In that case compassion took place, and inquiry was directed, whether any of the money was laid out in land. In *Jones v. Jones*, 10th July, 1752, the same inquiry was directed. In *Hardacre v. Massenger*, 10th March, 1753, Sir John Strange declared the land liable, without directing an inquiry. If it was *res integra*, I should think the evidence not admissible within the statute. But I must not be wiser than my predecessors; therefore refer it to the Master to inquire whether any and what part of the trust money was laid out in the purchase of the Sherborne-Woods and Ascot estates, or either, and which of them.

Master Bonner, on 4th December, 1761, reported the marriage and settlement, the purchase of Sherborne-Woods, and the agreement as before stated; and that Dighton did, by virtue of a letter of attorney from the three surviving trustees, on the 8th May, 1754, sell £5,347 South Sea annuities, part of the trust funds, and received the money, which, after deducting the brokerage, amounted to £4,010 10s.; and on the same day laid out £5,940 in the purchase of £5,711 4s. 6d. bank three per cent annuities, for the purposes therein mentioned; and that no proof having been laid before him that Dighton had money sufficient to purchase the said £5,711 4s. 6d. bank three per cent annuities, without employing in such purchase the said £4,010 10s. 1d. by him received for the said £5,347 trust stock, or some part thereof; and as the said Dighton did, on the said 8th May, 1754, sell the whole of the said

stock, and on the same day purchase the £5,711 4s. 6d. bank annuities, for the purposes before mentioned, he did conceive that the said John Dighton did intend to, and did really invest the same in the purchase of the said £5,711 4s. 6d. bank annuities, for the purposes aforesaid; and he conceived the £4,010 10s., being part of the trust money comprised in the settlement, was laid out and invested by the intestate John Dighton in the purchase of the estate called Sherborne-Woods, in manner aforesaid; and that it appears to him that the estate was afterwards conveyed to Dighton. The cause coming on for further directions on 27th January, 1762, his Honor decreed as follows: It appearing by the Master's report, that the sum of £4,010 10s. 1d., part of the trust money or funds, being part of the portion of the defendant Elizabeth Dighton, agreed to be secured by the marriage articles of 16th July, 1748, was invested by John Dighton, her husband, together with other money of his own, in the purchase of the Sherborne-Woods estate, declare that the same ought to be considered in the same plight and condition as if the same had not been invested, and to be subject to the trusts and limitations in the said articles.

Ryal v. Ryal, 4th February, 1739. Bill by legatees of John Ryal, against the executrix and heir-at-law of Jonathan Ryal, for satisfaction out of assets against the executrix, and as against the heir-at-law, to have satisfaction out of an estate purchased by Jonathan Ryal (as the plaintiff insisted) with the assets of John Ryal, the original testator. The defendant, the executrix, admitted that, as to one particular estate, it appeared by her testator's papers, &c., that it was purchased with £250 of the testator John Ryal's money. Proof was read, that Jonathan Ryal, after testator's death, purchased several estates; and that, before that time, he was a poor person, and not able to pay for them out of his own money. The counsel for the plaintiffs insisted that the heir-at-law was to be considered as a trustee for them, as far as the estate appeared to be purchased with the assets of John Ryal; and the case of *Balguey v. Hamilton*, 3d July, 1729, was cited for that purpose. On the other side, the case of *Kirk v. Webb*,¹ and *Kender v. Milward*,² were relied on, that money could not be followed into land.

LORD HARDWICKE, CHANCELLOR. The court has been very cautious of following money into land, but has done it in some cases. No one will say but the court would, if it was actually proved that the money was laid out in land. The doubt with the court, in these cases, has been on the proof. There is difficulty in admitting proof; parol proof might let in perjury; but it has always been done when the fact has been admitted in the answer of the person laying it out. If the executor of John Ryal had been a party, and admitted it, there would have been no doubt but the admission is by his representative, which,

¹ Prec. in Ch.

² 2 Vern. 440.

though it does not bind the heir, is ground for inquiry. The way of charging the heir is by considering him as a trustee; as when lands are purchased by one in the name of another, it is a resulting trust by law and out of the statute; and upon inquiry, a little matter will do to make it a charge *pro tanto*. Refer it to the Master to inquire whether the estate was purchased with £250 of the testator's money, or not.¹

¹ In accordance with the principal case, it is settled law that a trustee, executor, or agent who misapplies money or other property which he holds in a fiduciary capacity, to the purchase in his own name of other property, will hold the property so acquired in trust for the person whose property was misapplied. *Balguay v. Hamilton*, Amb. 414; *Ryall v. Ryall*, 1 Atk. 59; *Lench v. Lench*, 10 Ves. 517 (*semble*); *Trench v. Harrison*, 17 Sim. 111; *James v. Holmes*, 4 D. F. & J. 470; *Darkin v. Darkin*, 23 L. J. Ch. 890; *Piatt v. Oliver*, 3 How. 333, 401; *Philips v. Cramond*, 2 Wash. C. C. 441; *Telford v. Torrey*, 53 Ala. 120 (*semble*); *Sale v. McLean*, 29 Ark. 612 (*semble*); *Robles v. Clark*, 25 Cal. 317 (*semble*); *Martin v. Greer*, Ga. Dec. 109; *Williams v. Brown*, 14 Ill. 200; *Follansbe v. Kilbreth*, 17 Ill. 522; *Cookson v. Richards*, 69 Ill. 137; *Pugh v. Pugh*, 9 Ind. 132; *Malady v. McEnery*, 30 Ind. 273; *Rhodes v. Green*, 36 Ind. 7; *Tracy v. Kelly*, 52 Ind. 535; *Hampson v. Fall*, 64 Ind. 382; *Newberry v. Foster*, 1 Iowa, 271; *Claussen v. La Franz*, 1 Iowa, 226; *Schaffner v. Grutzmacher*, 6 Iowa, 137; *Robinson v. Robinson*, 22 Iowa, 427; *Fox v. Doherty*, 30 Iowa, 334; *McLaren v. Brewer*, 51 Me. 402; *Bancroft v. Cousen*, 13 All. 50; *Hancock v. Titus*, 39 Miss. 224; *House v. Jarden*, 52 Miss. 860 (conf. *Brooks v. Shelton*, 54 Miss. 353; *Friedlander v. Gerson*, 2 Woods, 675); *Valle v. Bryan*, 19 Mo. 423; *White v. Drew*, 42 Mo. 561; *Johnson v. Quarles*, 46 Mo. 423 (*semble*); *Lathrop v. Gilbert*, 2 Stockt. 344; *Stratton v. Dialogue*, 1 C. E. Green, 70; *Johnson v. Dougherty*, 3 C. E. Green, 406; *Meth. Church v. Jaques*, 1 Johns. Ch. 450; *Sweet v. Jacocks*, 6 Paige, 355; *Dickinson v. Codwise*, 1 Sandf. Ch. 214; *Day v. Roth*, 18 N. Y. 448; *Reid v. Fitch*, 11 Barb. 339; *Bridenbecker v. Lowell*, 32 Barb. 10; *Stafford v. Hinds*, 39 Barb. 625; *Newton v. Taylor*, 32 Ohio St. 399; *Wallace v. Duffield*, 2 S. & R. 521; *Harrisburg Bank v. Tyler*, 3 Watts & S. 373; *Kirkpatrick v. McDonald*, 11 Pa. 387; *Beck v. Uhrich*, 16 Pa. 499; *Fillman v. Divers*, 31 Pa. 429; *Robb's Appeal*, 41 Pa. 45; *Davis v. Davis*, 46 Pa. 342; *Eshleman v. Lewis*, 49 Pa. 410; *Caplinger v. Stokes*, Meigs, 175; *Turner v. Pettigrew*, 6 Hum. 438; *Maffit v. McDonald*, 11 Hum. 457; *Pritchard v. Wallace*, 4 Sneed, 405; *Gannaway v. Tapley*, 1 Cold. 572; 2 Cold. 246, s. c.; *Snell v. Elam*, 2 Heisk. 82; *Broyles v. Nowlin*, 59 Tenn. 191 (*semble*); *McClure v. Doak*, 6 Baxt. 364 (*semble*); *Hyden v. Hyden*, 6 Baxt. 406 (*semble*); *Barker v. Barker*, 14 Wis. 131.

Kirk v. Webb, Prec. Ch. 84; *Herron v. Herron*, Prec. Ch. 163; *Freem. C. C.* 246, s. c.; *Kinder v. Miller*, Prec. Ch. 172; 2 Vern. 440, s. c.; *Halcot v. Marchant*, Prec. Ch. 168; *Newton v. Preston*, Prec. Ch. 102; *Cox v. Bateman*, 2 Ves. 19, *contra*, are overruled. — Ed.

JAMES A. CAMPBELL v. JOHN B. DRAKE AND OTHERS.

IN THE SUPREME COURT, NORTH CAROLINA, DECEMBER TERM, 1844.

[*Reported in 4 Iredell, Equity, 94.*]

CAUSE removed from the court of equity of Wake County, at the Fall Term, 1845.

The bill states that the plaintiff kept a retail shop in Raleigh, and that a lad, by the name of John Farrow, was his shop-keeper for several years; and that, while in his employment, Farrow abstracted, to a considerable amount, money and goods belonging to the plaintiff, and that with the money of the plaintiff, taken without his knowledge or consent, Farrow purchased a tract of land at the price of \$500. The bill states a great number of facts, tending to show that Farrow paid for the land with the effects of the plaintiff, which he dishonestly converted to that purpose. Farrow afterwards died under age, and the land descended to his brothers and sisters; and the plaintiff, having discovered his losses of money and merchandise, and that Farrow had purchased the land as aforesaid, filed this bill against his heirs, and therein insists, that he has a right to consider the purchase as made, and the land held, for the use of the plaintiff, and that Farrow should be declared a trustee for him.

The bill was answered, so as to put in issue the various charges of dishonesty by Farrow, and the fact that the land was paid for with money purloined from the plaintiff: and much evidence was read to those points.

Badger, for the plaintiff.

Manly, for the defendants.

RUFFIN, C. J. The court, though naturally inclined to every presumption in favor of innocence, and especially of a young person, who seems to have been so well thought of while he lived, is satisfied from the proofs that the plaintiff was much plundered by this youth; and we have no doubt, that every cent of the money with which he paid for the land he had pilfered from his employer. Nevertheless, we believe the bill cannot be sustained. The object of it is to have the land itself, claiming it as if it had been purchased for the plaintiff by an agent expressly constituted; and it seems to us, thus stated, to be a bill of the first impression. We will not say, if the plaintiff had obtained judgment against the administrator for the money as a debt, that he might not come here to have the land declared liable, as a security, for the money laid out for it. But that is not the object of this suit. It

is to get the land, which the plaintiff claims as his ; and, upon the same principle, would claim it, if it were worth twenty times his money, which was laid out for it. Now, we know not any precedent of such a bill. It is not at all like the cases of dealings with trust funds by trustees, executors, guardians, factors, and the like, in which the owner of the fund may elect to take either the money or that in which it was invested. For, in all those cases, the legal title, if we may use the expression, of the fund, is in the party thus misapplying it. He has been intrusted with the whole possession of it, and that for the purpose of laying it out for the benefit of the equitable owner ; and therefore all the benefit and profit the trustee ought, in the nature of his office, and from his relation to the *cestui que trust*, to account for to that person. But the case of a servant or a shopkeeper is very different. He is not charged with the duty of investing his employer's stock, but merely to buy and sell at the counter. The possession of the goods or money is not in him, but in his master ; so entirely so, that he may be convicted of stealing them, in which both a *cepit* and *asportavit* are constituents. This person was in truth guilty of a felony in possessing himself of the plaintiff's effects, for the purpose of laying them out for his own lucre ; and that fully rebuts the idea of converting him into a trustee. If that could be done, there would be at once an end to punishing thefts by shopmen. If, indeed, the plaintiff could actually trace the identical money taken from him into the hands of a person who got it without paying value, no doubt he could recover it ; for his title was not destroyed by the theft. But we do not see how a felon is to be turned into a trustee of property merely by showing that he bought it with stolen money. If it were so, there would have been many a bill of the kind. But, we believe, there never was one before ; and therefore we cannot entertain this. But we think the facts so clearly established, and the demands of justice so strong on the defendants to surrender the land to the plaintiff, or to return him the money that was laid out in it, that we dismiss the bill without costs.

*Decree accordingly.*¹

¹ *Pascoag Bank v. Hunt*, 3 Edw. 583 (overruled) ; *Hawthorne v. Brown*, 3 Sneed, 462, *accord*.

See *Ensley v. Balentyne*, 4 Hum. 233 ; *Treadwell v. McKeon*, 7 Baxt. (Tenn.) 445 ; *Miller v. Birdsong*, 7 Baxt. (Tenn.) 531. — ED.

ELIZABETH S. NEWTON, APPELLANT, v. OLIVER PORTER,
HARRIS C. MINER, WILLIAM H. WARREN, AND OTHERS,
RESPONDENTS.

IN THE SUPREME COURT, NEW YORK, MARCH, 1872.

[*Reported in 5 Lansing, 416.*]

BALCOM, J.¹ The defendant, George E. Warner, stole \$14,000 worth of bonds from the plaintiff, and disposed of them for money; which money was lent, and promissory notes and an assignment of a mortgage on real estate were taken therefor. A portion of such notes and the real estate mortgage came to the hands and possession of the defendants, Porter, Miner, and Warren, attorneys of this court, who engaged to defend Warner and his wife for the larceny in stealing the bonds, and to procure bail for one or both of them before their trials. Porter, Miner, and Warren had knowledge or notice, as the case shows, either at the time they received the notes and mortgage or soon thereafter, that they were given for, or were purchased with, money obtained for the bonds which Warner and his wife, or one of them, had stolen from the plaintiff.

The justice at the Special Term dismissed the plaintiff's complaint with costs. After judgment was rendered against the plaintiff and for costs, she appealed therefrom to the General Term of this court.

The justice at the Special Term held that the plaintiff could not recover in this action the notes and mortgage that were given for, or were purchased with, money obtained for the bonds stolen by Warner and wife, or one of them, or the avails of such notes and mortgage, that had come into the possession and hands of the defendants, Porter, Miner, and Warren, though they had knowledge or notice that such notes and mortgage were given for, or were purchased with, money received for the bonds stolen from the plaintiff, before they became holders of such notes and mortgage, for full value paid or incurred therefor; for the reason, that no trust (in the opinion of the justice) was created or could be implied as to the notes and mortgage in the hands and possession of Porter, Miner, and Warren, in favor of the plaintiff. It was upon that ground that Porter, Miner, and Warren were allowed by the justice to keep the notes and mortgage that were given for, or were purchased with, money that was obtained for the bonds stolen from the plaintiff, together with the money those defendants had received on such notes and mortgage.

¹ The statement of facts, being substantially reproduced in the opinion of Balcom, J., is omitted, together with the concurring opinions of Miller, P. J., and Potter, J. — En

The defendants, Porter, Miner, and Warren, have attempted to sustain the decision and judgment rendered at the Special Term by the following authorities, viz. : *Hawthorn v. Brown*; ¹ *Ensley v. Balentine*; ² *Campbell v. Drake*; *Pascoag Bank v. Hunt*; ³ *Perry on Trusts*, 102 and 103. The plaintiff's counsel has cited many authorities on which he relies for a reversal of the decision and judgment of the Special Term, among which are *Hoffman v. Carow*; ⁴ *Bassett v. Spofford*; ⁵ *Heckle v. Lurvey and wife*; ⁶ *Hill on Trustees*, American notes, 3d ed. p. 212, old ed. p. 144; *Perry on Trusts*, §§ 166 and 211.

I am of the opinion the decision and judgment in this case should not be sustained on the foregoing authorities, cited by the defendants' counsel. It is clear that Porter, Miner, and Warren ought not, according to the rules of equity and good conscience, as administered in courts of chancery, to hold and enjoy all the notes and mortgages, or the entire avails thereof, in question in this action; and that in order to do complete justice to the plaintiff, the court should raise a trust by construction out of the facts in the case, and fasten it upon the consciences of those defendants, and convert them into trustees of the legal title, and order them to execute the trust in such manner as to protect the rights of the plaintiff. Such a trust is called a constructive trust. Such trusts differ from other trusts in that they are not within the intention or contemplation of the parties at the time the contract is made, from which they are construed by the court, but they are thrust upon a party contrary to his intention and against his consent. A court of equity, by raising a trust by construction, in a case like this, can do equal and complete justice between the parties. See *Perry on Trusts*, *supra*, § 166; *Hill on Trustees*, *supra*; 4 *Edw. Ch.* 215; 3 *Mason*, 232.

It was provided by the Revised Statutes that "the right of action of any person injured by any felony shall not, in any case, be merged in such felony, or be in any manner affected thereby." 2 *R. S.* 292, § 2. But that section has been repealed by sect. 73 of the Code, and sect. 7 of the Code has been substituted therefor, which is as follows: "Where the violation of a right admits of both a civil and criminal remedy, the right to prosecute the one is not merged in the other."

I think Porter, Miner, and Warren should be regarded and held to be trustees, and be adjudged to hold the notes and mortgage in question, and the avails thereof, as trustees by construction, for the benefit of the plaintiff. The court should not refuse to allow a party to recover the avails of property stolen from him, on any technical grounds, when the merits of the case clearly require that he should recover; and the court should jump all technicalities, and be as astute in discovering a remedy for upholding the rights of such a party as the thief is in con-

¹ 3 *Sneed*, 462.

² 4 *Humph.* 233.

³ 3 *Edw. Ch.* 583.

⁴ 22 *Wend.* 285.

⁵ 45 *N. Y.* 387.

⁶ 3 *Am. Rep.* 366.

triving ways and means to cheat him out of his property, and the avails of it, by changing the same from one kind to another, and placing it in the hands of third persons.

The plaintiff should be regarded the owner of the avails of the bonds that were stolen from her, until some other person shows a better or superior equitable right thereto than she had. The mere changing such avails from one kind of property or security into another, or from money into securities, did not affect the plaintiff's right thereto. Where a wilful trespasser converts another's corn into whiskey, the owner of the corn retains the title to the whiskey. *Silbury v. McCoon*.¹

According to the conclusions of fact found by the justice at the Special Term, Porter, Miner, and Warren received or held the notes and mortgage with notice or knowledge that they were given for, or were purchased with, money obtained by the thief, Warner, for bonds he had stolen from the plaintiff; and that with such knowledge, or after such notice, they have retained such notes and mortgage, or some of the avails thereof. And upon these conclusions of fact, justice and conscience require that the plaintiff should recover the notes and mortgage, or the avails thereof, over and above that portion thereof which the justice at the Special Term found that those defendants were entitled to retain, on the ground that they received the same in good faith for services they rendered, and disbursements they paid for the thief and his wife before the notes became due, and before they had notice that the notes were given for, or that the mortgage was purchased with, money the thief obtained for the bonds he had stolen from the plaintiff. There is authority for allowing those defendants to hold the notes and mortgage as security to the extent I have mentioned, or for permitting them to retain such portion as I have mentioned of the avails of the notes and mortgage. See *Perry on Trusts*, § 166. But they cannot hold the notes or mortgage, or any money they have received thereon or therefor, for services they have rendered or for disbursements they have paid for the thief and his wife, or either of them, since they knew or had notice of the plaintiff's claim to the notes and mortgage, or the avails thereof.

For these reasons I am of the opinion the plaintiff was entitled to a relief and a judgment in the action, and that judgment given against her should be reversed, and a new trial granted, costs to abide the event.²

¹ 3 Comst. 379.

² *Pirtle v. Price*, 31 La. An. 357; *Nat. Bank v. Barry*, 125 Mass. 20; *Bank of America v. Pollock*, 4 Edw. 215, *accord.* — Ed.

THOMPSON'S APPEAL.

IN THE SUPREME COURT, PENNSYLVANIA, SEPTEMBER 15, 1853.

[Reported in 22 Pennsylvania Reports, 16.]

APPEAL from the decree of the Common Pleas of Allegheny County.

This was an appeal by J. W. Thompson and others, from the decree of the court, affirming the distribution made by an auditor on the account of John Scott, assignee under a voluntary assignment by R. A. Cunningham.

Cunningham, the assignor, took out letters testamentary on the day of , A.D. 185 , on the estate of Seth Matthews, deceased, and converted the assets of said estate into cash, and used them in his business. On the 7th day of November, 1851, whilst indebted to said estate in the sum of \$1,579.84, he executed a voluntary assignment for the benefit of his creditors. The assignee filed his account, showing \$3,486.71 for distribution. An auditor having been appointed for that purpose, the indebtedness of the assignor being about \$18,000, the heirs of Seth Matthews claimed that the indebtedness to their father's estate, aforesaid, should be first paid in full. The auditor allowed their claim. Exception being taken by other creditors to such allowance, the matter was argued before the Court of Common Pleas, but the report of the auditor was confirmed. Appeal on the part of the other creditors to this court was taken, and one of the exceptions was to the payment in full of the claim of Matthews's heirs.

Selden, for plaintiff in error.

Watson, for appellee.

The opinion of the court was delivered, September 15, by

LEWIS, J. Whenever a trust fund has been wrongfully converted into another species of property, if its identity can be traced, it will be held in its new form liable to the right of the *cestui que trust*. No change of its state and form can divest it of such trust. So long as it can be identified either as the original property of the *cestui que trust*, or as the product of it, equity will follow it; and the right of reclamation attaches to it until detached by the superior equity of a *bona fide* purchaser for a valuable consideration, without notice. The substitute for the original thing follows the nature of the thing itself so long as it can be ascertained to be such. But the right of pursuing it fails when the means of ascertainment fail. This is always the case when the subject-matter is turned into money and mixed and confounded in a general mass of property of the same description. Story's Equity, §§ 1257, 1258, 1259. This mixture has taken place in the case under

consideration. It is impossible for a chancellor to lay his hand upon a single article of property or on a single dollar of money included in the assignment, and say that any particular thing or sum of money is either the original property of Seth Matthews's heirs or the product of it. The decree below was therefore erroneous.

Decree reversed, and decreed that the funds in the hands of the assignee be distributed *pro rata* among all the creditors of the assignor.

*Record remitted.*¹

TIMOTHY BRESNIHAN v. JOHN SHEEHAN AND ANOTHER.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, JANUARY 25, 1877,
JUNE 27, 1878.

[Reported in 125 *Massachusetts Reports*, 11.]

BILL in equity, under the Gen. Sts. c. 113, § 2, against John Sheehan and Ellen Sheehan, his wife. Ellen Sheehan demurred for want of equity. Hearing upon the bill and demurrer, before Ames, J., who reserved the case for the consideration of the full court. The facts appear in the opinion.

E. C. Bumpus, for Ellen Sheehan.

W. E. Jewell, for the plaintiff.

COLT, J. Under our statute, a creditor may maintain a bill in equity to reach and apply in payment of his debt any property, right, title, or interest, legal or equitable, of a debtor, which cannot be come at to be attached or taken on execution. Gen. Sts. c. 113, § 2, cl. 11. A creditor may thus reach the equitable assets of his debtor without having exhausted his remedies at law or reduced his claim to a judgment. *Tucker v. McDonald*.² He may enforce in his own name and for his own benefit, to the extent of his interest as creditor, the equitable title of his debtor to any property, real or personal, within the jurisdiction of the court, which cannot be taken on execution.

This bill is brought against husband and wife, by a creditor of the husband. The plaintiff alleges that the husband deposited all his wages

¹ See to the same effect *Frith v. Cartland*, 2 H. & M. 772 (*semble*); *Re West of England Bank*, 11 Ch. D. 772; *Le Breton v. Pierce*, 2 All. 8; *Watson v. Thompson*, 12 R. I. 466.

Although the trustee pays the proceeds of the trust property into a bank, blending them with his private account, the trust will still attach to the bank account: *Overseers v. Bank of Va.*, 2 Gratt. 544; and checks afterwards drawn for the private purposes of the trustee will be presumed to be drawn upon the funds belonging to him until they are exhausted: *Re Hallett's Estate*, 13 Ch. D. 696 (overruling *Pennell v. Deffell*, 4 D., M. & G. 372; *Brown v. Adam*, L. R. 4 Ch. Ap. 764). See also *Farmers' Bank v. King*, 57 Pa. 202. — ED.

² 105 Mass. 423.

with the wife for safe-keeping; that the latter, without the husband's knowledge, deposited the same in a savings bank, from time to time, and, without his knowledge or assent, used the amount so deposited, together with some money she had borrowed on her sole credit, in payment for certain real estate, the title to which she took and still holds in her own name. It is not alleged that this was done by the wife with any purpose on her part of aiding her husband to delay or defraud his creditors.

The prayer of the bill is, that the property of the husband, thus appropriated by the wife, may be applied to the payment of the plaintiff's debt; and, to that end, that the land may be conveyed to a receiver to sell the same, or so much of the same as may be necessary.

In support of the demurrer, it is contended that the plaintiff has no remedy against the land in question, either at law or in equity. It is clear that the land cannot, at law, be attached or taken on execution, as the property of the husband. It has been recently decided that when land was conveyed to the wife, which was paid for in part by the husband and in part by the wife, without any participation by the latter in the fraudulent intent of the husband to defraud his creditors, the same could not be reached under the Gen. Sts. c. 103, § 1, which authorize a creditor to levy on land fraudulently conveyed or paid for by the debtor, the record title to which is in another. In the case referred to, the debtor, with a purpose to defraud his creditors, paid part of the purchase-money, and his wife innocently paid the rest, and took the title in her own name. It was held that the equitable interest of the debtor, if any, which arose from his part payment of the purchase-money, could not be reached by the levy of an execution. *Snow v. Paine*.¹

Nor, upon the facts alleged, does this land come within the other description named in the statute last cited, namely, that of land purchased, or directly or indirectly paid for, by the debtor, the title to which is conveyed to a third person, on a trust for him, express or implied, whereby he is entitled to a present conveyance. A resulting trust is not created in favor of one who pays directly or indirectly part of the purchase-money for land conveyed to another, unless such payment is made for some specific or distinct portion of the estate. *McGowan v. McGowan*; *Snow v. Paine*, above cited. The money here appropriated by the wife was used with her own money, in a general payment towards the entire purchase, and the husband was not entitled, at law or in equity, to a present conveyance of the whole or of any distinct or aliquot portion of the whole.

The plaintiff's claim is, that the husband has an equitable interest which may be reached and applied, under the statute first cited, by a

¹ 114 Mass. 520.

decree in his favor. The money of the husband was deposited with the wife for safe keeping; she held it as bailee in trust for him. It was a breach of that trust, and a fraud upon him, for her to use it without his knowledge in the purchase of real estate; and he has a right, at his election, by proper proceeding in equity, to charge the land so purchased and held by her, to the extent of the money so wrongfully appropriated. The practical difficulty, in cases where a misappropriation of money is charged, arises from the difficulty of identifying and following it in its changed conditions into other property. But, in the language of Lord Ellenborough, in a well-considered case, "the difficulty which arises in such case is a difficulty of fact and not of law, and the dictum that money has no ear-mark must be understood as predicated only of an undivided and undistinguishable mass of current money," and not of "money in a bag, or otherwise kept apart from other money." *Taylor v. Plumer*.¹ And it was declared by Gibson, J., in *Wallace v. Duffield*,² that it was certainly law that money, although it had no ear-mark, might be followed into the land where it had been invested, in cases where the purchaser stood as trustee in relation to the fund. The trustee in such case ought not to be permitted to defeat the claim upon the land, so long as he continues to hold the title, by proving only that he contributed to the purchase-money, and mingled his own money with the money of the plaintiff. *Deg v. Deg*.³

These doctrines have been recognized in many American cases. In *Day v. Roth*,⁴ the plaintiff's money, held by one of the defendants for investment on her account, was invested in land, which was conveyed to the other defendant with a knowledge that the money was so misappropriated. The plaintiff's money was part only of the whole sum paid in the purchase and improvement of the land. It was declared that the fund was impressed with the characteristics of a trust, and that the plaintiff had the right to follow and claim it, so long as she could trace its identity, into whatsoever hands it might be transferred, and to charge it upon any man's estate in which she might find it invested, who was not an innocent purchaser; that the estate was chargeable with an equitable lien in her favor, in the nature of a resulting trust; and that she was entitled to a judgment for a sale of the property as upon foreclosure, in default of payment within a time named.

In *McLarren v. Brewer*,⁵ it was declared to be the settled doctrine, both in law and equity, that a mere change of property from one form to another cannot divest the owner of his property in it so long as it is capable of identification; and that money itself may be so followed.

¹ 3 M. & S. 562, 575.

² 2 S. & R. 521.

³ 2 P. Wms. 412.

⁴ 18 N. Y. 448.

⁵ 51 Me. 402.

In *Wallace v. Duffield*, above cited, it was said by Gibson, J., that when a trustee purchases with the trust fund and takes the conveyance in his own name, there is, properly speaking, no resulting trust, though it is usually called so; for there is in equity a very substantial difference between them, both in the quality and extent of the relief that can be called for. In the former, the trustee will be compelled to execute the trust by a conveyance of the land. In the latter, chancery will raise the money out of the land by a sale of the whole or such part of it as may be necessary to produce the sum withdrawn; and this mode is peculiarly convenient where only part of the consideration has been taken from the trust fund. See also *Cheney v. Gleason*; ¹ *Oliver v. Piatt*; ² *Kirkpatrick v. M'Donald*; ³ *Adams Eq. 33*, note; ² *Story Eq. Jur. §§ 1258, 1259*.

In the law of agency, the doctrine is more frequently applied, and, when the money of the principal has been wrongfully invested by the agent in land, equity will follow it into the land, and hold the legal owner, charged with notice, trustee for the benefit of him whose money has been so invested. *Story Agency*, § 229.

In the case at bar, upon the facts stated in the bill, the husband has an equitable lien upon the land conveyed to and now held by the wife. It is a valuable interest which cannot be come at to be attached or taken on execution. *Robinson v. Trofitter*.⁴ It may, therefore, under the statute, be reached and applied by the plaintiff to the payment of his debt, by bill in equity.

Demurrer overruled.⁵

¹ 117 Mass. 557.

² 3 How. 333.

³ 11 Pa. St. 387.

⁴ 109 Mass. 478.

⁵ *Day v. Roth*, 18 N. Y. 448, *accord*.

But see *contra*, *White v. Drew*, 42 Mo. 561; *Watson v. Thompson*, 12 R. I. 466, in which cases it was held that the party whose funds had been misapplied in part payment of property purchased in the name of another was entitled to a fractional portion of the property corresponding to the fractional portion of the purchase-money so misapplied.

In *Re Hallett's Estate*, 13 Ch. D. 696, Sir G. Jessel, M. R., after speaking of the *cestui que trust's* right "to elect either to take the property purchased, or to hold it as a security for the amount of the trust money laid out in the purchase," added, p. 709: "But in the second case, where a trustee has mixed the money with his own, there is this distinction, that the *cestui que trust*, or beneficial owner, can no longer elect to take the property, because it is no longer bought with the trust money simply and purely, but with a mixed fund. He is, however, still entitled to a charge on the property purchased for the amount of the trust money laid out in the purchase." — *Ed*

SECTION II.

Where a Person acquires an Interest in Property in regard to which, by reason of his Fiduciary Position, he has a Duty to perform for Another.

KEECH v. SANDFORD.

IN CHANCERY, BEFORE LORD KING, C., OCTOBER 31, 1726.

[*Reported in Select Cases in Chancery, 61.*]

A PERSON being possessed of a lease of the profits of a market, devised his estate to trustee in trust for the infant; before the expiration of the term the trustee applied to the lessor for a renewal, for the benefit of the infant, which he refused, in regard that it being only of the profits of a market, there could be no distress, and must rest singly in covenant, which the infant could not do; there was clear proof of the refusal to renew for the benefit of the infant, on which the trustee gets a lease made to himself. Bill is now brought to have the lease assigned to him, and to account for the profits, on this principle, that wherever a lease is renewed by a trustee or executor, it shall be for the benefit of *cestui que use*; which principle was agreed on the other side, though endeavored to be differenced, on account of the express proof of refusal to renew to the infant.

LORD CHANCELLOR. I must consider this as a trust for the infant; for I very well see, if a trustee, on the refusal to renew, might have a lease to himself, few trust estates would be renewed to *cestui que use*; though I do not say there is a fraud in this case, yet he should rather have let it run out, than to have had the lease to himself. This may seem hard, that the trustee is the only person of all mankind who might not have the lease: but it is very proper that rule should be strictly pursued, and not in the least relaxed; for it is very obvious what would be the consequence of letting trustees have the lease, on refusal to renew to *cestui que use*. So decreed that the lease should be assigned to the infant, and that the trustee should be indemnified from any covenants comprised in the lease, and an account of the profits made since the renewal.¹

¹ It is well settled that a person occupying a position of trust or responsibility towards another in regard to leasehold property cannot take a renewal of the lease for his own benefit, *e.g.*, —

Trustees. — *Fitzgibbon v. Scanlan*, 1 Dow, 261, per Lord Eldon; *Nesbitt v. Tredennick*, 1 Ba. & B. 29, 46 (*semble*); *McClanahan v. Henderson*, 2 A. K. Marsh. 388,

Ex parte LACEY.

IN CHANCERY, BEFORE LORD ELDON, C., FEBRUARY 3, 5, 1802.

[Reported in 6 Vesey, 625.]

THE subject of this petition was strong charges of misconduct by assignees under a commission of bankruptcy executed in the country, one of whom was a banker, into whose bank the money was paid. Another of the assignees was himself the purchaser of part of the bankrupt's estate, sold under the commission; and he also purchased from some of the creditors their dividends. The estates in question, consisting of three lots, were twice put up to sale. At the first sale

389 (*semble*); Heager's Estate, 15 S. & R. 65, 66 (*semble*); Fisk v. Sarber, 6 Watts & S. 18, 31, 35 (*semble*); Neal v. Cox, Peck, 443, 450 (*semble*).

See also Seabourne v. Powel, 2 Vern. 11; Webb v. Lugar, 2 Y. & C. Ex. 247; Hughes v. Howard, 25 Beav. 575; Winslow v. Tighe, 2 Ba. & B. 195; Stubbs v. Roth, 2 Ba. & B. 548; Jones v. Kearney, 1 Conn. & L. 34; Jackson v. Welsh, Ll. & G. t. Plunk. 346; Phyfe v. Wardell, 5 Paige, 268; Armour v. Alexander, 10 Paige, 571; Gibbes v. Jenkins, 3 Sandf. Ch. 130, where a constructive trust in a renewed lease was enforced in favor of annuitants or others having equitable claims upon the leasehold property.

Executors. — Holt v. Holt, 1 Ch. Ca. 190; Mulvany v. Dillon, 1 Ba. & B. 409; Huson v. Wallace, 1 Rich. Eq. 1.

Guardians. — Griffin v. Griffin, 1 Sch. & Lef. 352.

Mortgages. — Rushworth's Case, Freem. C. C. 13; Finch, 392; 2 Ch. Rep. 113, s. c.; Darrell v. Whitchot, 2 Ch. Rep. 59 (*semble*); Rakestraw v. Brewer, 2 P. Wms. 511; Holridge v. Gillespie, 2 Johns. Ch. 30.

Tenants for Life. — Taster v. Marriott, Amb. 668; Owen v. Williams, Amb. 734; Rawe v. Chichester, Amb. 715; 1 Bro. C. C. 198, n.; 2 Dick. 480, s. c.; Pickering v. Vowles, 1 Bro. C. C. 197; Moody v. Matthews, 7 Ves. 174; Parker v. Brooke, 9 Ves. 583; James v. Dean, 15 Ves. 236, 240; Brookman v. Hales, 2 V. & B. 45; Hardman v. Johnson, 3 Mer. 347; Randall v. Russell, 3 Mer. 190; Giddings v. Giddings, 3 Russ. 241; Tanner v. Elworthy, 4 Beav. 487; Waters v. Bailey, 2 Y. & C. C. C. 219; Mill v. Hill, 3 H. L. C. 828; 12 Ir. Eq. R. 107; Archbold v. Scully, 9 H. L. C. 360; Bowles v. Stewart, 1 Sch. & Lef. 209; Eyre v. Dolphin, 2 Ba. & B. 290; Buckley v. La Nanuz, Ll. & G. t. Plunk. 327; *Re* Tottenham, 16 Ir. Ch. R. 115; Stratton v. Murphy, Ir. R. 1 Eq. 345; *Re* Dane, Ir. R. 5 Eq. 498. Conf. Pole v. Pole, 2 Dr. & Sm. 420; Shrewsbury v. North Staffordshire Co., L. R. 1 Eq. 608.

Co-tenants. — Palmer v. Young, 1 Vern. 276; *Ex parte* Grace, 1 B. & P. 376; Hamilton v. Denny, 1 Ba. & B. 199; Jackson v. Welsh, Ll. & G. t. Plunk. 346; Burrell v. Bull, 3 Sandf. Ch. 15.

Partners. — Featherstonhaugh v. Fenwick, 17 Ves. 298; Clegg v. Fishwick, 1 Mac. & G. 294; Clegg v. Edmondson, 8 D., M. & G. 787 (*semble*); Clements v. Hall, 2 De G. & J. 173 (reversing s. c. 24 Beav. 333); Bell v. Barnett, 21 W. R. 119; Leach v. Leach, 18 Pick. 68; Struthers v. Pearce, 51 N. Y. 357; Mitchell v. Reed, 61 N. Y. 123; 19 Hun, 418, s. c.

See, further, Butler's Co. Lit. 290 b, n. (1), § XI. — ED.

the assignee was the purchaser at £420; another person, bidding *bona fide*, having gone to £415. The assignee, having them again put up some time afterwards, was at the subsequent sale again the purchaser, at £375. The solicitor for the commission appeared at the sale, bidding for the assignee.

Mr. Romilly, in support of the petition.

Mr. Richards and *Mr. Stratford* for the assignees, said, persons were misled by the rule as laid down in *Whichcote v. Lawrence*; ¹ not that a trustee cannot buy from the *cestui que trust*, but that he who undertakes to act for another in any matter shall not in the same matter act for himself, and therefore a trustee to sell shall not gain any advantage by being himself the person to buy.

LORD CHANCELLOR (ELDON). The rule I take to be this, not that a trustee cannot buy from his *cestui que trust*, but that he shall not buy from himself. If a trustee will so deal with his *cestui que trust*, that the amount of the transaction shakes off the obligation, that attaches upon him as trustee, then he may buy. If that case is rightly understood, it cannot lead to much mistake. The true interpretation of what is there reported does not break in upon the law as to trustees. The rule is this: a trustee who is intrusted to sell and manage for others, undertakes, in the same moment in which he becomes a trustee, not to manage for the benefit and advantage of himself. It does not preclude a new contract with those who have intrusted him. It does not preclude him from bargaining that he will no longer act as a trustee. The *cestuis que trust* may by a new contract dismiss him from that character; but even then that transaction, by which they dismiss him, must according to the rules of this court be watched with infinite and the most guarded jealousy, and for this reason, that the law supposes him to have acquired all the knowledge a trustee may acquire, which may be very useful to him, but the communication of which to the *cestui que trust* the court can never be sure he has made when entering into the new contract by which he is discharged. I disavow that interpretation of Lord Rosslyn's doctrine that the trustee must make advantage. I say, whether he makes advantage or not, if the connection does not satisfactorily appear to have been dissolved, it is in the choice of the *cestuis que trust*, whether they will take back the property or not, if the trustee has made no advantage. It is founded upon this, that though you may see in a particular case that he has not made advantage, it is utterly impossible to examine upon satisfactory evidence in the power of the court, by which I mean, in the power of the parties, in ninety-nine cases out of a hundred, whether he has made advantage or not. Suppose a trustee buys any estate, and by the knowledge acquired in that character discovers a valuable coal-mine under it; and locking that

up in his own breast enters into a contract with the *cestui que trust*; if he chooses to deny it, how can the court try that against that denial? The probability is, that a trustee who has once conceived such a purpose will never disclose it, and the *cestui que trust* will be effectually defrauded. In the case of *Fox v. Mackreth*,¹ so much referred to upon this subject, and now become a leading authority, in which I have now Lord Thurlow's own authority for saying he went upon a clear mistake in dissolving the injunction, it was never contended that if Fox, in a transaction clear of suspicion, but which, as I have stated, must be looked at with the most attentive jealousy, had discharged Mackreth from the office of trustee, he would not have been able to hold the purchase. Why? Because, being no longer a trustee, he was not under an obligation not to purchase. But we contended that it was not in the power of Fox to dismiss him; that the trust was accepted under an express undertaking to the friends of Fox that the trustee should not be dismissed without their privity; that Fox himself had too much imbecility of mind as to these transactions; and we contended that between the dates of Mackreth's taking upon himself the character of trustee and purchasing, he had acquired a knowledge of the value of the estate by sending down a surveyor at the expense of the *cestui que trust*, which was not communicated to the *cestui que trust* even at the moment of the supposed dissolution of the relation between them; and under those circumstances we contended that Mackreth remained a trustee. This was the principle upon which the cause was decided. Either that cause ought to have been decided in favor of Mackreth, or this court originally and the House of Lords finally were right in refusing an issue to try whether the estate was of the value Mackreth gave or of a greater value at that time. Upon this principle that was an immaterial fact; for, if the original transaction was right, it was of no consequence at what price he sold it afterwards; if the original transaction was wrong, Mackreth not having discharged himself from the character of trustee, if an advantage was gained by the most fortuitous circumstance, still it was gained for the benefit of the *cestui que trust*, not of the trustee.

Upon these principles it is perfectly clear that an assignee under a commission of bankruptcy, a trustee to sell for the benefit of the creditors and of the bankrupt, cannot buy for his own benefit. In *Whelpdale v. Cookson*,² I understand Lord Hardwicke did confirm the sale in case the majority of the creditors interested should not dissent. With all humility I doubt the authority of that case; for if the trustee is a trustee for all the creditors, he is a trustee for them all in the article of selling to others; and if the jealousy of the court arises from the difficulty of a *cestui que trust* duly informing himself what is most or least for his advantage, I have considerable doubt whether the majority in

¹ 2 Bro. C. C. 400; 2 Cox, 320.

² 1 Ves. 9.

that article can bind the minority. That question does not arise upon the state of facts in this case.

As to the purchase of the debts by the assignee, as assignees cannot buy the estate of the bankrupt, so also they cannot for their own benefit buy an interest in the bankrupt's estate, because they are trustees for the creditors. In that respect there is no difference between assignees and executors, who cannot for their own benefit buy the debts of the creditors. I do not say there may not be cases of that kind, in which in a moral view the transaction between the executor and the creditor may not be blamable; but the court must act upon general principles. Consider the prodigious power of assignees connected with solicitors under the commission, and bankers receiving the money over the creditors and the bankrupt. Unless the policy of the law makes it impossible for them to do anything for their own benefit, it is impossible to see in what cases the transaction is morally right. But it is enough to say the assignee was a trustee for the benefit of those entitled to the interest in the residue. He must buy for them and not for himself. Therefore, as to the debts bought, this assignee must be a trustee either for the creditors or for the bankrupt; for which upon the circumstances is doubtful yet. If persons who are trustees to sell an estate are there professedly as bidders to buy, that is a discouragement to others to bid. The persons present seeing the seller there to bid for the estate to or above its value do not like to enter into that competition. It is the duty of the solicitor to the commission in point of law to insist that the assignee should make the utmost value. In this case the solicitor had two interests, drawing him different ways. Lord Kenyon, in *Twining v. Morrice*,¹ thought the sale might be prejudiced by the mere circumstance that the agent for the vendor appeared as a bidder. That is going a great way; but it shows that the court is in the habit, at least, of strictly regarding such a circumstance. It may be a material prejudice, even if he says he bought it in. For instance, in *Kirton's Case* lately £23,000 was *bona fide* bid; and the estate was bought in by the agent for the vendor. Afterwards there was another sale in the Master's office; and the consequence of that circumstance, deterring others from bidding, was, that the estate finally sold for £7,000, a depreciation contrary to all experience. So this very estate, sold before to his assignee for £420 at that sale, produced a real bidder at £415; but being bought in was afterwards sold again to the same assignee for £375. He cannot hold that purchase; but I am called upon to charge him with the sum of £420. Upon that I have great hesitation as to what I ought to do, not being sure what will be the effect of the precedent. Suppose, instead of this small difference, it had been the case of an estate with a coal-mine, as it was in *Kirton's Case*,

¹ 2 Bro. C. C. 326.

and the unauthorized biddings of the assignees had occasioned such a loss as there was in that instance, I ought to consider long whether that loss should fall upon the creditors. I wish to consider farther upon the part of the case; as, though the value is small in this instance, it is of great importance as a precedent. I wish assignees to understand from this that they are not to buy in without the privity of the creditors at least, admitting that this assignee in buying acted honestly, meaning to act for the benefit of the creditors, and fairly. As to the particular desire of the bankrupt, I admit they are to have considerable regard to the desire of the bankrupt; but that is not to be carried too far; and this distinction must be attended to, whether it is for his own benefit, or honestly intended for the benefit of his creditors; in which latter case it may have considerable weight.

With respect to the purchase of these three lots I shall hold him to the purchase as against himself, but not in his favor. I shall therefore make the same order that I made in another bankruptcy,¹ that an account shall be taken of the rents and profits from the time of the purchase; that these lots shall be sold again, being put up at the sum of £375; if any one bids more, the assignee shall not have them, and if not, he shall take them; reserving my opinion upon the question how he is to be charged as to the difference in the amount of the two sales, and declaring him a trustee as to the dividends purchased, being clearly of opinion that an assignee cannot under any circumstances buy a debt for his own benefit.²

LEES v. NUTTALL.

IN CHANCERY, BEFORE SIR JOHN LEACH, M. R., NOVEMBER 24, 1829.

[*Reported in 1 Russell & Mylne, 53.*³]

THE bill prayed that the defendant Nuttall might be declared a trustee for the plaintiff Lees, of all the right and interest which he had acquired in a certain estate, and that he might be decreed to convey such right and interest to the plaintiff.

The wife of the plaintiff and her sister, as administratrixes of their father, were entitled to a mortgage debt charged on the premises in question; and the plaintiff, in right of his wife and with the sanction of the sister, had long been in possession of the premises as mortgagee. He was desirous of becoming the owner of the equity of redemption,

¹ *Ex parte Hughes*; *Ex parte Lyon*, 6 Ves. 617.

² Additional authorities upon the point decided in the principal case will be found in the Appendix to this volume. — ED.

³ Tambl. 82, s. c. — ED.

which was in the defendant Walker; and, in 1818, he employed Nuttall as his attorney to negotiate the purchase. Various attempts were made to accomplish this object, but without success. In March, 1824, a fresh negotiation was opened by the defendant Walker, who wrote a letter to Lees, proposing to sell the premises to him for £1,200. This letter was dated the 25th of March; and Lees, having determined to accede to the terms, sent his son on the following day to inform Walker that he accepted his offer. On the 27th of March, the son, by the direction of his father, went to Nuttall, and, having informed him of what had been done, instructed him to draw a formal agreement of purchase, and to procure Walker's signature to it. Nuttall did not on that occasion profess any unwillingness to act as the agent of the plaintiff, or intimate that he was in treaty for the purchase of the property on his own account; but, within a day or two afterwards, he went over to the place of Walker's residence, and in his own name entered into a written agreement, dated the 29th of March, 1824, for the purchase of the premises at £1,100. This agreement did not purport to be entered into on behalf of Lees.

The defendant Nuttall, by his answer, claimed the benefit of the purchase, stating that for two months before the 29th of March, 1824, he had been in treaty with Walker for the purchase of the equity of redemption; that he entered into the agreement with Walker on his own account; and that he did not, in the transaction, consider himself as the attorney of Lees.

The material facts of the plaintiff's case were established by evidence.

Mr. Pepys and Mr. K. Parker, for the plaintiff.

Mr. Bickersteth and Mr. T. Parker, for the defendant.

THE MASTER OF THE ROLLS, on the ground that Nuttall had been employed by the plaintiff as his agent for the purchase of the estate, made a decree against Nuttall according to the prayer of the bill, and with costs.¹

¹ Alden v. Fouracre, 3 Sw. 489; Taylor v. Salmon, 4 M. & Cr. 134; Switzer v. Skiles, 8 Ill. 529; Moore v. Bracken, 27 Ill. 23; Dennis v. McCagg, 32 Ill. 429; Winn v. Dillon, 27 Miss. 494; Parkist v. Alexander, 1 Johns. Ch. 394 (*semble*); Dickinson v. Codwise, 1 Sandf. Ch. 214, 224-228; Giddings v. Eastman, 5 Paige, 561; Reed v. Warner, 5 Paige, 650.

See also Murphey v. Sloan, 24 Miss. 658; Wellford v. Chancellor, 5 Grat. 39.

Conf. cases cited *supra*, p. 291, n. 1, ¶ (1). — Ed.

ANDERSON v. LEMON.

IN THE COURT OF APPEALS, NEW YORK, MARCH, 1853.

[Reported in 4 Selden, 236.]

THIS was an appeal from the decision of the Superior Court of the city of New York, dismissing the bill filed by the appellant (Anderson) against Lemon, his former partner, praying for a partition, or a sale and division of the proceeds of certain real estate occupied by the parties as copartners under a lease, the fee of which had been purchased by the defendant in his own name during the existence of the copartnership, and that the defendant account for the subsequent use of the property. The facts sufficiently appear in the report of the decision in the court below (4 Sandf. S. C. Rep. 552), and in the opinion of this court.

F. B. Cutting, for appellant.

C. O'Conor, for respondent.

GARDINER, J., delivered the opinion of the court. In a note to *Moody v. Matthews*,¹ it is said, as a deduction from adjudged cases, that "with a possible exception in favor of a *bona fide* purchaser, it seems to be a universal rule that no one who is in possession of a lease, or a particular interest in a lease, which lease is affected with any sort of equity in behalf of third persons, can renew the same for his own use only; but such renewal must be construed as a graft upon the old stock." In *Featherstonhaugh v. Fenwick*,² it was held that a renewal, obtained one month before the expiration of the lease by two of three partners for their own benefit, inured to the partnership and must be accounted for as partnership property. But it has been held in several cases that during the continuance of the lease any one, even a trustee of the leasehold interest, may purchase the reversion in fee on his sole account. For although the *cestui que trust* will be deprived of all claim of renewal, yet it has been thought impossible to consider the purchase of the inheritance as a graft upon leasehold or life interests. 7 Ves. 186, note, Sumner's ed.; 3 Mer. 197, 352; 3 Atk. 38. The learned judge who delivered the opinion of the Superior Court was therefore correct in saying that a copartner was at liberty to make the purchase stated in this case under circumstances free from deception and fraud, and consequently to retain it.³

These parties were copartners. They had an established place of business, which had been improved with their joint funds. It is obvious that when the negotiations for the purchase of the lot in question were

¹ 7 Ves. 185, Sumner's ed.

² 17 Ves. 298.

³ 61 N. Y.

first discussed, each of them supposed the copartnership would continue on some terms, although those terms were to be the subject of future adjustment. Under these circumstances the complainant proposed to purchase the premises. The object of that purchase, or one of the objects, as is conceded, was to preserve for the copartnership jointly their place of business, with all its advantages of location and established reputation. In the negotiations which ensued, the parties consulted with each other and acted together. The complainant was the agent by whom the propositions previously canvassed and agreed upon were communicated to the agent of the owners of the fee. The results of these interviews between Anderson and West were communicated from time to time to the defendant, who assented to what was proposed, and continued to advise with the complainant in relation to the joint purchase, down to the 26th of August. Upon that day, as the defendant alleges in his answer, the treaty as to the continuance of the copartnership ended in a definite proposition upon the part of the complainant, which the defendant in one part of his answer states that he rejected, and in another that the complainant requested an answer to his proposal, and that he in reply observed that he could say nothing further as to the copartnership until he received a letter from his brother in Troy.

Now from the early part of the previous May, the defendant had been negotiating secretly with West, the agent of the owners, for the purchase of this property for his own benefit; and while advising with his partner as to a joint purchase, was covertly bidding against him, with a request that his name might be concealed. His excuse for conduct which an honorable man could hardly justify, is, that he had learned for the first time, in August, that the complainant intended to purchase in his own, and not in the partnership name. This excuse cannot be true if West is to be believed, for he swears that the first overtures to him on the part of Lemon were in May, and that the biddings continued down to the month of August, during which time the property had been advanced from \$14,000 to \$17,000 by successive bids, and was finally taken by the defendant at \$18,000.

Again, he does not pretend that the complainant intimated that the title which he was to take in his own name was not for the partnership account, or that he (the defendant) objected to the proposed mode of securing the property. The difference between the parties was as to the terms of the subsequent partnership, not as to the mode in which the title was to be obtained. The copartnership had not then terminated, and its continuance was in the contemplation of both parties; the purchase was ostensibly to be made for the benefit of the firm: the complainant upon the facts proved and admitted would have been the agent of both parties in effecting the bargain; and I see no reason

why the defendant as the copartner and confidential adviser of the complainant did not incur the same obligation. If he designed to act independently of the complainant, he should have declared his intention when the parties would have stood upon a footing of equality. As it was, he availed himself of the influence arising from the relation existing between him and the complainant as copartner, and as his confidential adviser, in a treaty for the purchase of real estate, begun and continued for months for their joint benefit, to induce such action upon the part of the firm as should ultimately throw the property and the good-will of the establishment into his own hands. This was not merely an offence against good morals: it was a legal fraud, against which the complainant is entitled to relief. The defendant took a fraudulent advantage of his situation, and must be held a trustee of the property thus acquired for the benefit of the copartnership. 1 Paige, 158, and cases there cited; 17 Vesey, 311. In the last case it was held that a partner could not treat privately behind the back of his copartner for a renewal of a lease of the property where the business of the firm was carried on; if he did so, he should be held a trustee for the firm. In that case the copartner obtaining the renewal was merely silent as to his intentions. Here the defendant counselled with, and by his conduct and declarations intentionally induced the plaintiff to believe that he was acting for the benefit of the firm, when his object was to secure the purchase for himself. There is nothing in the nature of the property acquired that can shield the defendant from the consequences of such a fraud.

The judgment should be reversed, and the defendant declared a trustee, &c. *Ordered accordingly.*¹

¹ Lacy v. Hall, 37 Pa. 360, *accord*.

See Jones v. Jones, 5 Hare, 440, 460, 462; Hayward v. Pile, L. R. 5 Ch. Ap. 214. — ED.

SECTION III.

Trusts in Favor of a Vendee under a Contract of Sale.

MARK C. FELCH v. DAVID HOOPER AND ANOTHER.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, JANUARY 12,
OCTOBER 23, 1875.

[Reported in 119 Massachusetts Reports, 52.]

BILL in equity, filed December 2, 1873, against David Hooper and Matilda H. Hooper, of Portland, in the State of Maine, alleging the following facts:—

On August 16, 1873, David Hooper executed and delivered to the plaintiff a bond, a copy of which was annexed to the bill, and was as follows:—

“Know all men by these presents, that I, David Hooper, of Portland, county of Cumberland and State of Maine, am holden and stand firmly bound unto Mark C. Felch, of Somerville, county of Middlesex and State of Massachusetts, in the sum of five thousand dollars, to the payment of which to the said obligee or his executors, administrators, or assigns, I do hereby bind myself, my heirs, executors, and administrators.

“The condition of this obligation is such that whereas the said obligor has agreed to sell and convey unto the said obligee a certain parcel of real estate situated on Wallace Street, in Somerville, aforesaid, and bounded as follows [describing it].

“The same to be conveyed by a good and sufficient warranty deed of the said obligor, conveying a good and clear title to the same, free from all incumbrances.

“And whereas for such deed and conveyance it is agreed that the said obligee shall pay the sum of eighteen hundred dollars, of which one hundred and fifty dollars are to be paid in cash upon the delivery of this bond, and the remainder, bearing interest after sixty days at the rate of eight per cent per annum.

“Now therefore if the said obligor shall, upon tender by the said obligee of the aforesaid cash at any time within ninety days from this date, deliver unto the said obligee a good and sufficient deed as aforesaid, then this obligation shall be void, otherwise it shall be and remain in full force and virtue.”

On the delivery of the bond the plaintiff paid to David Hooper the sum of \$150, as required by the terms of the bond.

In view of the sale made to him as aforesaid and soon after the execution and delivery of the bond, David Hooper verbally authorized the plaintiff to enter upon the land and erect dwelling-houses thereon in such manner as the plaintiff might deem fit and proper; and thereupon the plaintiff proceeded to erect such buildings and has almost completed one house on one of said lots, and has laid the foundation of another house on the other lot, and has laid out and invested therein a large sum of money, in the whole, nearly \$2,500.

At and before the expiration of the ninety days mentioned in the bond, which expired on November 14, 1873, the plaintiff was ready to pay the balance of the purchase-money, as therein provided; but as Hooper had not paid the annual taxes assessed upon the land by the city of Somerville on May 1, 1873, which constituted an incumbrance thereon, and did not pay the same until November 21, he could not before said last-named day have given a deed of conveyance in accordance with the terms of the bond. On that day, immediately after the payment of the taxes by David Hooper, the plaintiff offered and tendered to him the whole balance of the purchase-money for the land then remaining due to him according to the terms of the bond, and demanded from him a conveyance of the land, which David Hooper refused.

The bill then averred on information and belief that afterwards on the same day Hooper caused a deed to be recorded in the registry of deeds, purporting to be a conveyance of the land from him to the defendant Matilda H. Hooper, his mother; that this conveyance was merely colorable and without consideration, and made with the fraudulent intention of compelling the plaintiff to pay an increased price for the land or to lose the buildings which he has erected thereon.

The prayer of the bill was that the defendants be ordered by a decree of the court to execute, acknowledge, and deliver to the plaintiff a deed of conveyance in conformity with the terms of the bond, on payment of the balance of the purchase-money; and for further relief.

On December 6, 1873, an attested copy of the bill was served on the defendants at Portland, in the State of Maine.

On February 2, 1874, the defendants demurred to the bill on the ground that the court had no jurisdiction over them.

On February 17, 1874, the plaintiff filed an amendment to the bill, alleging that the contract by which David Hooper sold the land in question to the plaintiff was entered into and concluded between the latter and an agent of David Hooper in Somerville, and was intended to be carried out in this Commonwealth; that David Hooper was at Somerville in person at the time when the taxes were paid by him and when the offer and tender of the balance of the purchase-money were made to him by the plaintiff; that on the same day David Hooper acknowledged the deed to Matilda H. Hooper, before a justice of the

peace in said county of Middlesex, and caused the same to be placed on record while Matilda H. Hooper was at her home in Portland; that since that time the defendants have pretended that David Hooper had actually sold the land to Matilda H. Hooper, but David Hooper has proposed and offered that if the plaintiff would pay a sum much larger than the price stipulated for in the bond, he would procure a conveyance of the land from Matilda H. Hooper to him; that after the execution and delivery and recording of said bond and a payment of a part of the purchase-money as therein provided, and especially after the said tender of the remainder of the purchase-money, which he is and has been ready to pay, the said David Hooper held and the said Matilda H. Hooper now holds the title to said land, and is seised thereof upon a trust for the benefit of the plaintiff; that the defendants have constantly and fraudulently refused to make a conveyance thereof to him, though often requested so to do, unless he would pay a large sum in addition to the price agreed upon; and now, in pursuance of a fraudulent scheme by them conceived to compel the plaintiff to pay an increased price for the land or lose the improvements he had made thereon by consent of David Hooper, before the time when he should have conveyed the same to the plaintiff, and also lose that portion of the purchase-money paid on delivery of the bond, the defendants, though duly notified of this suit, refuse to answer the plaintiff's bill and refuse to submit themselves to the jurisdiction of this court, and remain obstinately without the Commonwealth.

The prayer of the amended bill was that the said land may be decreed to belong beneficially to the plaintiff, and that some proper person may be appointed and authorized to convey to him the legal title thereof, and that the balance of the purchase-money now remaining in his hands, after deducting therefrom the costs of this suit, may be safely deposited or invested under the direction of this court, to be paid over or transferred to the defendants, only upon the execution and delivery by them of a proper deed or deeds to convey or confirm the title of said land to the plaintiff; and for further relief.

The defendants thereupon demurred to the amended bill, assigning as ground of demurrer "that it appears by the plaintiff's own showing that this court has no jurisdiction of the parties defendant in this bill or either of them, and that there has been no legal and sufficient service of the same on said defendants or either of them to authorize this court to take jurisdiction therein."

The case was reserved by Colt, J., for the consideration of the full court, upon the bill as amended and the demurrer.

A. C. Buzzell, for the defendants. Neither of the defendants is, or ever has been, an inhabitant of this State, nor, at the time this bill was filed, was either within this State, nor was any service made on either of them within the jurisdiction of this court. Under such circumstances,

this court has decided that a bill for the specific performance of a contract to convey land within the State cannot be maintained. *Spurr v. Scoville*; ¹ *Moody v. Gay*.²

The bill does not show the existence, at any time, of such a trust as is contemplated by the Gen. Sts. c. 100. That statute was intended to apply only to trusts formally created by deed, or raised by necessary intendment in wills, and has no reference whatever to contracts like this, or to constructive or resulting trusts, the existence of which is in doubt or disputed, as in the case at bar. It was not intended to apply where issues of fact are to be tried, but only where the trust relation is conceded. Where such issues are to be tried, the court must have jurisdiction of the person. The "sale" and "conveyance" referred to in the statute relate to sales for reinvestment and conveyance for that purpose, or to trustees not under the disabilities named in section 15. The legislature practically adopted this view in giving Probate Courts original jurisdiction "over all matters relating to the sale of trust estates, of which the Supreme Judicial Court now has exclusive jurisdiction." St. 1869, c. 331; *Dana v. Petersham*; ³ *Perry on Trusts*, §§ 25-27.

G. W. Park and *G. F. Piper*, for the plaintiff.

COLT, J. The question raised by this demurrer is not whether a contract for the conveyance of land in this Commonwealth can be specifically enforced against a defendant upon whom no service is made within this State, and who is not and never has been a resident. That question was decided in the case of *Spurr v. Scoville*.¹

The question here is whether under such a contract in writing the plaintiff who has paid or tendered the consideration, and has by the defendant's permission entered upon the land and made improvements thereon, can under our statutes, upon the allegations of this bill, enforce his equitable title to the land in any form.

In *Spurr v. Scoville*, it was said that the only effectual decree which could be rendered upon the allegations in that case would require a conveyance of the land in question by the defendant personally; and that courts of equity would not proceed in a cause, where the decree asked for required an absent defendant, not subject to their jurisdiction, to be active in its performance, but could deal only with persons who could be compelled by process to obey their orders. The decision is placed expressly on the ground that the suit was a proceeding *in personam* merely, in which no decree was sought against the property, and no allusion is made to statutory provisions which upon proper allegations might perhaps have afforded relief.

The case at bar differs in this respect, and the plaintiff seeks to

¹ 3 Cush. 578.

² 15 Gray, 457.

³ 107 Mass. 598, 602.

enforce an equitable right in the land itself. The bill, as amended, avers that the contract relied on and the payment and other facts alleged were sufficient to charge the land with a trust in the plaintiff's favor, which the defendants refused to perform by refusing to make the required conveyance. And a prayer is added that the land may be decreed to belong beneficially to the plaintiff, and may be conveyed to him by some person duly appointed by the court. To the bill as amended there is a special demurrer on the ground that the court has no jurisdiction of the parties.

The doctrine is well established in equity that from the time a valid contract for the sale of land is made, that which ought to have been done is treated, as between the parties, as already done; and the seller and his representatives, and subsequent purchasers from him with notice, will be held to be trustees for the purchaser, for the purpose of affording the latter a remedy against the estate. *Atcherley v. Vernon*; ¹ *Daniels v. Davison*; ² *Waddington v. Banks*; ³ *Lewin on Trusts* (3d ed.), 174, 175.

Our statutes give this court power to enforce the performance of a contract for the sale of land, made by a deceased person, and to order the executor or administrator to make a conveyance, which it is declared shall have the same force and effect as if made by the person who made the agreement to convey, thus giving effect to the deed of the legal representative although the legal title is in the heirs-at-law, and treating the subject-matter of the contract as personal or real, according to the character which has been given to it by its terms. Gen. Sts. c. 117, §§ 5, 6.

Upon the facts stated in this bill, the land in question is charged with an implied trust in the plaintiff's favor; and the court is not powerless to enforce that trust, merely because the parties holding the legal title are beyond its reach. It is said that courts of equity will never allow a trust to fail for want of a trustee. Such a trustee this court is now authorized to appoint, by a statute which provides that when a person, seised of an estate upon a trust, express or implied, is out of the Commonwealth, or not amenable to the process of any court therein having equity powers, this court shall have power to order a conveyance to be made thereof in order to carry into effect the objects of the trust, and may appoint some suitable person in the place of the trustee to convey the same in such manner as it may require. Gen. Sts. c. 100, § 15.

This statute expressly includes implied trusts, and cannot be confined in its application to trusts which are created by deed or will and do not depend upon the proof of facts which may be open to dispute. *Walsh v. Walsh*.⁴ Most implied trusts are of the latter description. The

¹ 10 Mod. 518, 527.

² 16 Ves. 249, 255.

³ 1 Brock. 97.

⁴ 116 Mass. 377.

statute gives the court power to render an effectual decree, and that is enough to sustain the jurisdiction when the parties or the subject-matter are within its reach. *Ward v. Arredondo*.¹ The decree will be binding on absent parties to the extent of its effect on the land only, even though all parties interested have been notified in accordance with the rules of court. In other States, under similar statutes, similar relief is granted. *Matteson v. Scofield*; ² *Rourke v. McLaughlin*.³

Upon this demurrer the existence of the trust must be assumed, and the entry must be *Demurrer overruled*.⁴

¹ Hopk. Ch. 213.

² 27 Wis. 671.

³ 38 Cal. 196.

⁴ In *Lysaght v. Edwards*, 2 Ch. D. 499, real estate which a testator had contracted to sell was held to pass under a devise of "all real estate which at my death may be vested in me as trustee, subject to the trusts affecting the same." Sir G. Jessel, M. R., said, p. 506: "It appears to me that the effect of a contract for sale has been settled for more than two centuries; certainly it was completely settled before the time of Lord Hardwicke, who speaks of the settled doctrine of the court as to it. What is that doctrine? It is that the moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser, the vendor having a right to the purchase-money, a charge or lien on the estate for the security of that purchase-money, and a right to retain possession of the estate until the purchase-money is paid, in the absence of express contract as to the time of delivering possession. In other words, the position of the vendor is something between what has been called a naked or bare trustee, or a mere trustee (that is, a person without beneficial interest), and a mortgagee who is not, in equity (any more than a vendor), the owner of the estate, but is, in certain events, entitled to what the unpaid vendor is; viz., possession of the estate and a charge upon the estate for his purchase-money. Their positions are analogous in another way. The unpaid mortgagee has a right to foreclose, that is to say, he has a right to say to the mortgagor, 'Either pay me within a limited time, or you lose your estate,' and in default of payment he becomes absolute owner of it. So, although there has been a valid contract of sale, the vendor has a similar right in a court of equity; he has a right to say to the purchaser, 'Either pay me the purchase-money, or lose the estate.' Such a decree has sometimes been called a decree for cancellation of the contract; time is given by a decree of the court of equity, or now by a judgment of the High Court of Justice; and if the time expires without the money being paid, the contract is cancelled by the decree or judgment of the court, and the vendor becomes again the owner of the estate. But that, as it appears to me, is a totally different thing from the contract being cancelled because there was some equitable ground for setting it aside. If a valid contract is cancelled for non-payment of the purchase-money after the death of the vendor, the property will still in equity be treated as having been converted into personalty, because the contract was valid at his death; while in the other case there will not be conversion, because there never was in equity a valid contract. Now, what is the meaning of the term 'valid contract'? 'Valid contract' means in every case a contract sufficient in form and in substance, so that there is no ground whatever for setting it aside as between the vendor and purchaser, — a contract binding on both parties. As regards real estate, however, another element of validity is required. The vendor must be in a position to make a title according to the contract, and the contract will not be a valid contract unless he has either made out his title according to the contract or the purchaser has accepted the title; for however bad the title may be, the purchaser has a right to accept it, and the moment he has

accepted the title, the contract is fully binding upon the vendor. Consequently, if the title is accepted in the lifetime of the vendor, and there is no reason for setting aside the contract, then, although the purchase-money is unpaid, the contract is valid and binding; and being a valid contract, it has this remarkable effect, that it converts the estate, so to say, in equity; it makes the purchase-money a part of the personal estate of the vendor, and it makes the land a part of the real estate of the vendee; and therefore all those cases on the doctrine of constructive conversion are founded simply on this, that a valid contract actually changes the ownership of the estate in equity. That being so, is the vendor less a trustee because he has the rights which I have mentioned? I do not see how it is possible to say so. If anything happens to the estate between the time of sale and the time of completion of the purchase it is at the risk of the purchaser. If it is a house that is sold, and the house is burnt down, the purchaser loses the house. He must insure it himself if he wants to provide against such an accident. If it is a garden, and a river overflows its banks without any fault of the vendor, the garden will be ruined, but the loss will be the purchaser's. In the same way there is a correlative liability on the part of the vendor in possession. He is not entitled to treat the estate as his own. If he wilfully damages or injures it, he is liable to the purchaser; and more than that, he is liable if he does not take reasonable care of it. So far he is treated in all respects as a trustee, subject, of course, to his right to being paid the purchase-money and his right to enforce his security against the estate. With those exceptions, and his right to rents till the day for completion, he appears to me to have no other rights. . . .

"It must, therefore, be considered to be established that the vendor is a constructive trustee for the purchaser of the estate from the moment the contract is entered into." See also *Hadley v. London Bank*, 3 D., J. & S. 63, 70, per Turner, L. J.; *Shaw v. Foster*, L. R. 5 H. L. 321. — ED.

CHAPTER VII.

EXECUTED AND EXECUTORY TRUSTS.

EARL OF STAMFORD AND WIFE, APPELLANTS, v. SIR JOHN
HOBART, RESPONDENT.

IN THE HOUSE OF LORDS, MARCH 30, 1710.

[*Reported in 3 Brown's Parliamentary Cases (Tomlins's edition), 31.*]

SIR JOHN MAYNARD, by his will, dated the 21st of March, 1689, devised to his wife, afterwards Countess of Suffolk, his capital house and manor of Gunnersbury, and all his lands in the parishes of Ealing and Acton, in the county of Middlesex, for her life, to her own use; and the reversion thereof, together with the manors of Clifton, Hardmead, Burleon, and Beer, and all other his estate in England, he devised to his said wife, Richard Lord Gorge, and Maynard Colchester, Esq., and their heirs, upon the several trusts in his said will mentioned. Then follows this clause: "My will is, that my said trustees and their heirs (after the death of my said wife) convey the said manors of Clifton and Hardmead to the use of or in trust for Sir Henry Hobart and Elizabeth his wife, for their lives, and the life of the longer liver of them; the remainder to the first son of the said Elizabeth for ninety-nine years, if he shall so long live; the remainder to the heirs males of the body of such first son; the remainder to all and every the sons of the said Elizabeth for ninety-nine years, if every such son respectively shall so long live; the remainder to the heirs males of every of them, to take, not jointly, but successively, one after the other, according to the births of each of them, — the sons to take the term of ninety-nine years, with immediate remainder to his said heirs males; the remainder thereof to Mary Maynard (now Countess of Stamford), for her life; the remainder thereof to all and every her sons, for such like term of ninety-nine years; and with remainder to the heirs males of the body of every such son, immediately after each term. And that the said manor and avowson of Beer and the reversion of the said capital messuage and manor of Gunnersbury and the manor of Burleon shall be (by advice of counsel) conveyed to or to the use of Mary Maynard (now Countess of Stamford), for life, without impeachment of waste, other than in houses; and after, the remainder to all and every her son and sons, for ninety-nine years, if such son shall so long live; with

several remainders to the heirs males of the body of every such son, — they and all their heirs males of their bodies to take successively, according to their age and birth and seniority of every such son respectively, each son to take the said term, with remainder immediately to his said heirs males; and after the determination of the said estates, and failure of such heirs males of their respective bodies, the remainder thereof to the said Elizabeth Hobart, and the sons of the said Elizabeth, with such terms and remainders to the heirs males of their bodies as is formerly for the other lands expressed; the remainder of all the estates in England to John Leigh, Maynard Colchester, and Henry Colchester, and their heirs, during the life and lives of the said Sir Henry Hobart and Dame Elizabeth his wife, and of the said now Countess of Stamford, for to preserve the contingent estates, and to no other use or purpose.”

In October, 1690, the testator died, leaving Dame Elizabeth Hobart and the Countess of Stamford his granddaughters and co-heirs at law; but neither of them had any male issue living at the time of his death.

Divers controversies afterwards arising between Sir Henry Hobart and his lady, the appellants, and the Countess of Suffolk, relative to the testator's will, an act of Parliament was passed in the year 1694, entitled “An act for settling the estate of Sir John Maynard, Knt., deceased,” whereby it was, *inter alia*, enacted that the real estate by the said Sir John Maynard's will, given or appointed, should go unto and be held and enjoyed by such person and persons, to and for such estates and interests, and under and subject to such charges, limitations, and appointments, and in such manner and form, as is in the said will expressed, and subject to the provisos in the said act; and the said trustees were thereby authorized and empowered to convey the said manors and lands immediately unto such person and persons and for such estate and estates as the same were in and by the said will limited and appointed to be conveyed, as if the said Countess of Suffolk was dead. And in this act was a proviso that the Earl of Stamford and Sir Henry Hobart should have several terms of ninety-nine years (in case they should so long live, and survive their said wives) in the premises to their respective wives limited or appointed by the said will.

Sir Henry Hobart and his lady afterwards died, leaving issue the respondent, their only son, and several daughters.

In Easter Term, 1707, the respondent exhibited his bill in the Court of Chancery against the appellants and the Earl and Countess of Suffolk, the Lord Gorge, and Maynard Colchester, and others, praying that the trustees might convey the said manors and premises, according to the testator's will and the said act of Parliament.

On the 24th of January, 1707, the cause was heard before the Lord Chancellor Cowper, when his Lordship decreed that the defendants, the Earl and Countess of Suffolk, Richard, Lord Gorge, and Maynard Colchester, should forthwith execute conveyances of the said Sir John Maynard's real estate, according to his said will, and the words of the act of Parliament, and that a master should settle the conveyances so to be executed.

Accordingly, the Master settled and allowed the draft of a conveyance, whereby the said estate was mentioned to be conveyed to Thomas Carter and Charles Clayton and their heirs; *habendum* to them and their heirs; to the several uses, intents, and purposes in the said will and act of Parliament limited, expressed, and declared, and to and for no other use, intent, or purpose whatsoever.

To the Master's report of this draft the plaintiff excepted, for that the premises ought, at least, to have been limited to the use of the said Carter and Clayton and their heirs, and only in trust for such person and persons and such estate and estates as were in and by the said will and act of Parliament limited; whereby the legal estate might be vested in the said trustees, for the better preservation of the contingent limitations, which otherwise, as the draft was prepared, were liable to be destroyed, and the testator's intention plainly defeated.

The matter of this exception came on to be heard before the Lord Chancellor on the 19th of December, 1709, when his Lordship declared, "That in matters executory, as in case of articles or a will directing a conveyance, where the words of the articles or will were improper or informal, that court would not direct a conveyance according to such improper or informal expressions in the articles or will, but would order the conveyance or settlement to be made in a proper and legal manner, so as might best answer the intent of the parties; and, in this case, his Lordship conceived the true intent of the will to be, that the estates should be secured, as far as the rules of law would admit, to the issue male of the respective devisees, before the cross-remainders should take place, and that it was designed to be as strict a settlement as possible by law;" his Lordship, therefore, decreed that in the said conveyance, where any part of the estate was limited in use to the plaintiff for ninety-nine years, if he should so long live, there should be a limitation over to trustees and their heirs during his life, to preserve the contingent uses in remainder; and then to the first and other sons of the plaintiff in tail male successively; and where any part of the estate was limited to the defendant the Countess of Stamford for life, and then to the Earl for ninety-nine years, if he should so long live; that there should also be a limitation over to trustees and their heirs during the lives of the said Earl and Countess, and the survivor of them, to preserve the contin-

gent uses in remainder ; and then to the first and every other son of the Countess of Stamford, and the heirs male of the body of such first and every other son ; and then to the right heirs of Sir John Maynard.

From this decree the defendants, the Earl and Countess of Stamford, appealed ; and, on their behalf, it was argued that the act of Parliament expressly enacted “ that the real estate of the said Sir John Maynard, by his will given or appointed, should go unto and be held and enjoyed by such person and persons and for such estates and interests and in such manner as in the said will was expressed ; and that the trustees should immediately convey the said real estate to such person and persons and for such estate and estates as the same were in and by the said will limited and appointed.” And accordingly the decree, on the hearing of the cause, directed the conveyance to be pursuant to the will, and in the words of the act of Parliament ; and it could not be denied but that the draft of the conveyance, as approved by the Master, settled the premises to the persons and to the same estate and estates as were limited and appointed by the will. It was, therefore, difficult to imagine that the act of Parliament, which was so very express in confirming the estates appointed by the will, ever intended that a court of equity should have power to direct a conveyance to other uses than what were mentioned in the will ; but the decree complained of did so, and was therefore repugnant both to the will and act of Parliament, as well as to the former decree. That Sir John Maynard very well knew how and in what manner he could devise and dispose of his real estate ; and, being willing to try the limitation of a remote remainder to the issue male of the sons of his daughters respectively (when neither of them had any sons living), which, by the rules of law, he could not limit in certainty, but might perhaps in contingency, he thought fit to run the risk of those limitations taking effect, since one daughter and her sons, as well as the other, would have a chance for the advantage by the contingency not happening ; and this chance having now happened for the benefit of the Countess of Stamford, it was hoped a court of equity could not take it away from her. That, as the appellants had not the least desire to alter the will and act of Parliament in anything, it was not reasonable to put them in a worse condition than the will and act had put them, by which the appellant, the Countess, was to have an estate in law conveyed to her for her life, with such remainders over as in the will are mentioned ; but by the last decree some estates directed both by the will and act were totally omitted, and other estates not mentioned therein were newly created ; and this under pretence of preserving the contingent remainders, when it had not yet been determined whether they were good or not, and which by this order were endeavored to be made good, so that in effect

a new will was thereby made, and the validity of these remainders prevented from being tried at law. That, if Sir Henry Hobart and his wife were living, it might very well be supposed no objection would have been made to the draft of the conveyance as settled by the Master, for then they and the appellants would have been upon an equal footing; but the life-estates of Sir Henry Hobart and his lady being determined, and the first term for ninety-nine years being now vested in possession in the respondent, their only son, the limitation to the heirs male was endeavored by this new-intended conveyance to be made good, after the advantage of its being void had accrued to the appellants, and to carry the limitations of the estate farther than could be done with respect to the Countess, she having at present no son to take the term for ninety-nine years, so that as to her that term, by this conveyance, was quite lost, although there could be no reason given why the deaths of Sir Henry Hobart and his lady should prejudice the appellants. That, it must be agreed, several of the limitations in the bill were contingent, and might either never happen or be destroyed, — the will itself being an attempt to create a perpetuity, and a new mode of fettering estates, which had not been countenanced either in the courts of law or equity; and, therefore, there could be no reason to assist this project in equity, beyond the words of the will and act of Parliament. And if all the contingent uses in remainder, after the term of ninety-nine years to the first son, were void, the reversion of the whole estate would descend to the appellant, the Countess, and the respondents, as heirs-at-law of Sir John Maynard, which would be equally for their advantage. That it was considerable how far the act of Parliament would make good these contingent limitations, and supply the want of particular estates to support them; but as the testator himself was not positive they were good, so he intended to leave them to the determination of the law, when there should be a proper occasion, and to let them stand or fall by legal rules; and, therefore, it was conceived to be unjust for a court of equity, in directing a conveyance to be executed by trustees, which was only a collateral matter, to attempt the omission of some estates, and the creation of others, to make good these new-invented contingencies and limitations, and to prevent the legal determination of their validity.

On the other side, it was contended that the decree complained of was perfectly right and just, and that a conveyance conformable thereto was most agreeable to the will and act of Parliament. For that Sir John Maynard did not intend his will for a conveyance, but only as directions for a strict settlement, and that his real estates should be conveyed in such manner as that they might be sure to go to such persons and for such estates as he had by his will appointed; and for this reason he directed his trustees to convey, by advice of counsel, and to the use of or in trust for Sir Henry Hobart and Elizabeth Hobart, for their

lives, with remainders over, — thereby giving his trustees a latitude either of vesting a legal estate or conveying a trust, as might best consist with the law, and serve the intent of the testator, when such conveyance should be executed, which he designed should not be done till after the death of his wife, during which time sons might happen to be born. That in cases of executory articles for the settling of estates, in prospect of future conveyances to be afterwards made, it was usual for courts of equity to help informalities and supply defects, — especially when the things supplied were necessary to support the main intent of the parties, and to carry such articles into execution according to that intent, so far as it might agree with law, though not strictly according to the words and penning of the articles; and *a fortiori* would courts of equity do so in the case of a will, where the same was only executory, by a conveyance to be made. That the plain intent of the testator was, that the manors of Clifton and Hardmead, which by the will were limited to the respondent for ninety-nine years, if he should so long live, should go to the issue male of his body, before the remainder limited to the Countess of Stamford should take place in her and her issue male; and in like manner, that the Devonshire, Lincolnshire, and Middlesex estates, which were limited to the Countess, should go to her issue male before the remainder thereof, limited to the respondent, should take place in him and his issue male; and this intent was not only well pursued by the decree, but could not be supported by a conveyance made in any other manner than as thereby directed. For by a conveyance made pursuant to the draft allowed by the Master, and contended for by the appellants, the issue male of Sir John Hobart would be totally defeated of that part of the estate which was allotted to them; and the same would immediately, upon the death of their father, come to the Earl and Countess of Stamford, — because, at the instant of executing such a conveyance, the contingent remainders intended by the will for Sir John's issue male would be entirely void, for want of a freehold to support them; and, therefore, such an estate was always inserted in conveyances, for the sole purpose of supporting these contingent remainders, although a freehold so limited to trustees is only artificial, and mere matter of form to make the conveyance good. Besides, immediately after executing such a conveyance as was contended for on the other side, it would be in the power of Lord Stamford alone, by fine, feoffment, or other conveyance, to destroy the contingent estates and interests in the whole real estate limited by the will to the issue male of the Countess; and likewise the contingent estates and interests thereby also limited in the Devonshire, Lincolnshire, and Middlesex estates, to the issue male of the respondent, which is utterly repugnant to the whole intent and design of the will. That the act of Parliament made no alteration in the will as to the

point in question : it only hastened the time for the trustees to convey, even in the lifetime of the Countess of Suffolk, and in some other particulars not relative to the question ; but in all other respects the act confirmed the will, and, being strictly relative to it, the intent of the will ought to be the rule for the conveyance.

Accordingly, after hearing counsel on this appeal, it was ordered and adjudged that the same should be dismissed, and the decree therein complained of affirmed.¹

EDWARD TREVOR v. JOHN TREVOR.

IN CHANCERY, BEFORE LORD PARKER, C., EASTER TERM, 1720.

[*Reported in 1 Peere Williams, 622.*]

SIR JOHN TREVOR, late Master of the Rolls, being seised in fee of the capital messuage called Brinkynall, and diverse lands in the counties of Denbigh and Salop, on his marriage with Jane Puleston, by articles dated the 23d of October, 1669, in consideration of the then intended marriage, did for himself and his heirs covenant with the trustees therein named, before the end of two years to settle and assure upor the said trustees, as they the said trustees should direct and appoint all the premises to the several uses in the articles expressed, as also in the settlement and conveyance, as should be limited and agreed upor by Sir John Trevor and the said trustees, and to no other use ; viz., to the use of him the said Sir John Trevor for life without waste, remainder to the use of Jane his intended wife for her life, remainder to the use of the heirs male of him on her body to be begotten, and the heirs male of such heirs male lawfully issuing, remainder to his own right heirs.

Sir John Trevor by the same articles covenanted with the trustees that the premises should remain after his decease to the said Jane his intended wife for her life, free from all incumbrances, and in case the uses were not thereafter well and truly raised, according to the true intent and meaning of the articles, that then he and his heirs should stand and be seised of the premises, until such time as a farther assurance should be thereof made to the uses of the said articles.

The marriage took effect, and Sir John had issue by Jane, the plaintiff Edward Trevor, and the defendants John, Arthur, Tudor, Anne (afterwards Lady Middleton), and Prudentia Trevor.

No settlement was made pursuant to the articles, nor any request by

¹ *Baskerville v. Baskerville*, 2 Atk. 279 ; *Woodhouse v. Hoskins*, 3 Atk. 22 ; *Marryat v. Townly*, 1 Ves. Sen. 102 (*semble*), *accord.* — Ed.

the trustees; and the plaintiff Edward incurred his father's displeasure, having without his consent married a woman of no fortune.

Sir John Trevor and his wife Jane levied a fine of the premises, declaring the uses thereof to himself and his wife for their lives, remainder to the second son, the defendant John Trevor, in tail male, and so to the younger sons in tail male successively; and this settlement was, by consent of the plaintiff's father and mother, delivered to the defendant John Trevor.

Afterwards Sir John Trevor died intestate, leaving a real estate in Ireland, of about £900 a year, and some new purchased estates in fee in England, which descended to the plaintiff Edward Trevor, and possessed likewise of a very great personal estate, the plaintiff Edward's share whereof came to near £10,000.

The plaintiff Edward Trevor brought his bill to compel the second son John Trevor, and the other brother and sisters who claimed under the fine and deed of uses of Sir John and his wife, to convey the premises to himself in tail as heir of Sir John Trevor and his lady.¹

But LORD CHANCELLOR decreed against the defendant John Trevor the second son, on these reasons.²

That marriage articles were in their nature executory, and ought to be construed and moulded in equity according to the intention of the parties.

Now that intention was plain in this case, and the consideration extended to the heirs male of the body of Sir John by his lady, as well as to her in respect of her jointure.

Besides, the agreement was to settle the premises to himself for life without impeachment of waste, and to the heirs male of his body by Jane, and to the heirs male of such heirs male; so that it could not be doubted but that the intention was, Sir John should have an estate for life only, and the privilege of waste would be to no purpose, if he was to have an estate tail, which would of course have made him dispunishable for waste.

That if within the two years the wife's trustees had called for a settlement, or had brought a bill to compel a performance of the marriage articles, there could be no question but that, according to the several precedents which have been in this court, equity would have directed the settlement to have been made to Sir John for life, remainder to his first son, &c.; and to say precedents have not gone so high and so far backwards as the date of these articles seemed immaterial; for what

¹ The argument of counsel for the defendant is omitted. — ED.

² These reasons are stated more at length in 1 Eq. Cas. Ab. 390. And so *Jones v. Langhton*, 1 Eq. Cas. Ab. 392, pl. 2; *Nandick v. Wilkes*, 1 Eq. Cas. Ab. 393, pl. 5; *Cusack v. Cusack*, 1 Bro. P. C. 470. *Et vide* *West v. Errissey*, 2 P. Wms. 349, where an actual settlement was made before marriage.

is reason, equity, and good conscience now, always was and always would be so.

And as, if the trustees had applied within the two years, in order to have a settlement made, it would then have been directed to be made to the first, &c., son of the marriage, surely their default or neglect should never hurt the issue of the marriage: it were absurd to say it should.

That it would be a strange and vain construction of the articles if Sir John should have such an estate by them, the limitations of which the very next day he might by a fine destroy; and making such a settlement upon the first, &c., son, would not be a breach of the covenant, because it would be a settlement according to the intention of it; and a settlement according to the intention of the covenant is not a breach, but a performance of it.

That by the whole scope of these articles they were never designed for a settlement, but only a bare agreement, how and to what uses the premises in question should be settled. For first Sir John Trevor covenanted, within two years, to settle and assure the premises to trustees and their heirs, as they or their heirs or their counsel should appoint, to the several limitations and uses in the articles mentioned, and also in the said settlement, as should be agreed upon by Sir John Trevor and the trustees.

That the covenant to stand seised, in the latter end of the articles, could not be taken as a final settlement from the words of it; and the precedent part of them were provisional only, viz. to stand till a settlement should be made effectually to answer the intention of the parties.

That the articles gave a right to the eldest son to claim these lands in specie, which, if he insisted upon, he must have; and if other lands had been given to him in satisfaction, still he might have claimed these lands, and equity could not have hindered him. That he did not claim the Irish or after-purchased estate by the gift of the father, but rather of Providence; for it was highly improbable that the father, who had given his son such a character in those hard and severe expressions by his deed of settlement, should entertain any favorable intentions towards him. And that the eldest son, being a purchaser under the marriage articles, must prevail against a voluntary conveyance made by the father to his younger son.

That as to such part of the premises as was sold by Sir John for a good consideration, that was but a small part, and the purchaser would still enjoy it, as he had no notice of the articles at the time of his purchase.

Then his Lordship cited the decree in the case of *Bale v. Coleman*, where Lord Harcourt made a distinction betwixt a devise of a trust of land to A. for life, with a power to make leases, &c., remainder to the

heirs male of his body, holding this to be an estate tail; but that in articles on a marriage to settle lands to A. for life, &c., remainder to the heirs male of his body by the wife, the articles being executory, and but as minutes, the settlement should be according to the intention, and consequently to the first son, &c.

Lastly, his Lordship said this appeared to have been the opinion of Sir John Trevor himself, and showed a decree made by him to the same effect upon marriage articles.

That if this construction were not made upon marriage articles, it would give way to fraud and over-reaching, and to the defeating of the manifest intentions of the parties in settlements, in which the issue of the marriage are considered as purchasers.

Wherefore his Lordship decreed that the second son, John Trevor, and his younger brothers and sisters should join in a fine to the eldest son, to hold to him in tail, with remainders to the other sons in tail successively, according to the marriage articles.

From this decree an appeal was brought *in domo procerum*, where the matter was greatly debated by Lord Chancellor and Lord Nottingham for the decree, and Lords Trevor and Harcourt against it; but at length the decree was affirmed without any division.¹

I was of counsel for John Trevor the second son, both in the court of chancery and on the appeal.²

¹ 2 Bro. P. C. 122.

² Griffith v. Buckle, 2 Vern. 13; Jones v. Langhton, 1 Eq. Ab. 392; Nandick v. Wilkes, 1 Eq. Ab. 393; Gilb. Eq. 114, s. c. (*semble*); Davies v. Davies, 4 Beav. 54; Phillips v. James, 2 Dr. & Sm. 404; Grier v. Grier, L. R. 5 H. L. 688; Maguire v. Scully, 2 Hog. 113; Gause v. Hale, 2 Ired. Eq. 241; Smith v. Maxwell, 1 Hill Eq. 101, *accord*.

See also Howel v. Howel, 2 Ves. 358; Powell v. Price, 2 P. Wms. 535; Neves v. Scott, 9 How. 196; 13 How. 268, s. c.; Loring v. Eliot, 16 Gray, 568; Garner v. Garner, 1 Dess. 437.

If the settlement is actually made after the marriage, but not in the mode in which the court would have decreed, it will be rectified. *Streatfield v. Streatfield*, Cas. t. Talb. 176; *Legg v. Goldwire*, Cas. t. Talb. 20; *Warrick v. Warrick*, 3 Atk. 293; *Gallard v. Porcher*, McMull. Eq. 358. But a settlement made before the marriage overrides the articles: *Legg v. Goldwire*, *supra*; *Warrick v. Warrick*, *supra*; unless a contrary intention appears: *Honor v. Honor*, 1 P. Wms. 123; *Roberts v. Kingsly*, 1 Ves. 238; *West v. Errissey*, 2 P. Wms. 349. — ED.

PAPILLON v. VOICE.

IN CHANCERY, BEFORE SIR JOSEPH JEKYLL, M. R., TRINITY TERM,
1728, AND LORD KING, C., HILARY TERM, 1731.

[*Reported in 2 Peere Williams, 471.*]

A. DEVISED £10,000 to trustees, to be laid out in a purchase of lands, and to be settled on B. for life, without impeachment of waste, and from and after the determination of that estate to trustees and their heirs during the life of B., to preserve contingent remainders, remainder to the heirs of the body of B., with remainders over, with a power to B. to make a jointure; and, by the same will, A. devised lands to B. for his life, without waste, and from and after the determination of that estate to trustees and their heirs during the life of B., to preserve contingent remainders, remainder to the heirs of the body of B., remainders over, and died leaving C. executor.

B. brings his bill against the executor to have the £10,000 laid out in land, and settled in the same manner, and with the like limitations as the land was devised by the will, by which, it was insisted, a plain estate tail vested in B., and also that C., the executor, should deliver to B. the writings relating to the land devised, he being entitled to the inheritance.¹

MASTER OF THE ROLLS. I have not heard any case cited, nor do I know of any at present, where lands being devised to A. for life, remainder to the heirs of his body, this in case of a will has been construed an estate tail in A. The intent of this will is most plain; but how far consistent with the rules of law, and also how far the same words "heirs of the body" in the same will may be construed, as to the devise of lands, to be words of limitation, and yet in the devise of lands to be bought words of purchase, I shall consider. But this is a new case.

Afterwards, on the — of December following, the Master of the Rolls, having taken time to consider of this matter, solemnly gave his opinion that, as to the devise of the lands in this case, an estate for life only passed to the plaintiff B., with remainder to the heirs of his body by purchase; and, therefore, the plaintiff should not have the writings delivered to him, but these should be brought into court; and that, as to the money to be laid out in lands and to be settled to the same uses, the court had most evidently power over that, which, therefore, should be settled so as to make the plaintiff tenant for life only,

¹ The arguments of counsel are omitted. — Ed.

and that his sons should take in tail male successively, &c., according to the intention of the testator.¹

But, the cause coming afterwards upon an appeal before Lord Chancellor King, his Lordship declared, as to that part of the case where the lands were devised to B. for life, though said to be without waste, with remainder to trustees to support contingent remainders, remainder to the heirs of the body of B., this remainder was within the general rule, and must operate as words of limitation, and consequently create a vested estate tail in B.,² and that the breaking into this rule would occasion the utmost uncertainty; wherefore the writings and title-deeds of this estate ought to be delivered to B., the plaintiff. But, as to the other point, Lord Chancellor declared the court had a power over the money directed by the will to be invested in land; that the diversity was where the will passes a legal estate, and where it is only executory, and the party must come to this court, in order to have the benefit of the will; that, in the latter case, the intention should take place, and not the rules of law; so that, as to the lands to be purchased, they should not be limited to B. for life, with power, &c., remainder to the heirs of his body, but to B. for life, with power, &c., remainder to trustees during his life to preserve contingent remainders, remainder to his first and every other son in tail male, remainder over, &c.³

¹ 1 Reg. Lib. B. 1727, fol. 336.

² Though this was Lord Chancellor's opinion, yet the question as to the land devised was given up, the plaintiff having brought a supplemental bill, whereby it appeared that by his father's marriage articles he was entitled to an estate tail.

³ Leonard v. Earl of Sussex, 2 Vern. 526; Lord Glenorchy v. Bosville, Cas. t. Talb. 3; For. 3, s. c.; Roberts v. Dixwell, 1 Atk. 607; Read v. Snell, 2 Atk. 648 (*semble*); Bagshawe v. Spencer, 1 Ves. Sen. 142; White v. Carter, 2 Eden, 366; Bastard v. Proby, 2 Cox, 6; Jervoise v. Northumberland, 1 Jac. & W. 570 (*semble*); Woolmore v. Burrows, 1 Sim. 512; Stonor v. Curwen, 5 Sim. 264, 268 (*semble*); Shelton v. Watson, 16 Sim. 543; Davenport v. Davenport, 1 H. & M. 775. See also Rochfort v. Fitzmaurice, 4 Ir. Eq. R. 375.

In Bagshawe v. Spencer, Lord Hardwicke is reported to have said, p. 152: "As to the second objection, of the difference between trusts executed and executory, no one is more unwilling than I am *quieta movere*. But this distinction never has been established by any direct resolution, though said *arguendo*; and was it to be examined to the bottom, it might sound strange, how it should be established. All trusts in notion of law are executory, and to be carried into execution here by subpoena, according to the old books. At common law, every use was a trust; the statute conjoined the legal estate thereto; and therefore a trust executed is in strictness a legal estate; so that to bring a case within the jurisdiction of chancery it must be executory. The first essential part, therefore, of a trust is that the trustee is to convey the estate some time or other, whether the testator has directed it or not; which every testator is presumed to know. Therefore, a doubt may be reasonably made how there can be a difference whether the testator has in words directed a conveyance or not, since the court take notice that the testator could not intend it should always remain in trust

AUSTEN v. TAYLOR.

IN CHANCERY BEFORE SIR ROBERT HENLEY, K., JUNE 30,
JULY 2, 1759.

[*Reported in 1 Eden, 361.*¹]

THE Reverend John Holman, by his will, bearing date the 19th of December, 1756, after devising certain lands in Northin, gave and devised all other his freehold and gavelkind lands whatsoever to trustees and their heirs, upon the trusts following: In the first place, to the intent and purpose that his four sisters should severally and respectively receive and take an annuity or rentcharge of £80 per annum, and subject thereto, in trust for the plaintiff John Austen and his assigns, for his life, without impeachment of waste; remainder to the said trustees to preserve contingent remainders; remainder to the use of the heirs of the body of the said John Austen; remainder to testator's own right heirs.

He then, after giving certain pecuniary legacies, gave the residue of his personal estate to the said trustees, in trust, to lay out the same in one or more purchase or purchases of freehold messuages, &c., of an estate of inheritance in fee-simple; which said premises should then after remain, continue, and be, to, for, and upon such and the like estate or estates, uses, trusts, intents, and purposes; and under and subject to the like charges, restrictions, and limitations as were by him before devised, limited, and declared, of and concerning his lands

tees. I have said this may be doubted of, and do not choose to carry it further, out of deference to those great men who have relied on it. I have great deference for Lord Talbot's opinion; but take his decree in *Lady Glenorchy's Case* to be so right as not to want the aid of the distinction there made. [Tal. 19.] But how far did it amount to a positive opinion to bind him? The words are, that 'in trust executed or immediate devise it ought to be the same in law or equity; because the testator did not suppose there would be any other conveyance, and therefore no other conveyance would be presumed.' But I have shown that some time or other a conveyance must be made, which the testator is presumed to know. If by the words 'act executed' is there meant 'deed in the testator's life,' it is proper; but if only a devise to trustees upon immediate trust, without expressly directing a conveyance, I beg leave to doubt of it, and whether the court would not be bound to direct a conveyance in strict settlement, as it was there in *Leonard v. Lord Sussex*. But it appears in the end that Lord Talbot formed no fixed opinion to bind himself, but only an inclination, if it was an immediate devise; and it appears that he afterwards relaxed from it, for, in *Withers v. Algood*, he made the same construction upon a trust in a deed, wherein was no direction of conveyance, nor anything to distinguish it from a trust executed." But his Lordship seems afterwards to have admitted the distinction between executed and executory trusts. See *Exel v. Wallace*, 2 Ves. Sen. 323; *Lloyd v. Jones*, 2 Cox, 8, cited. — Ed.

¹ Amb. 376, s. c. — Ed.

and premises last before devised, or as near thereto as might be and the deaths of persons would admit.

The bill prayed an account of the personal estate, that the surplus might be invested and the will established, and plaintiff be let into possession. The only question was, whether the plaintiff was entitled to an estate for life or in tail in the lands to be purchased.

The Attorney-General and Bonner, for the plaintiff.

The question for the determination of the court is, what estate the plaintiff is entitled to in the residuum of the testator's personal estate; because the limitation of the real estate is too clear to admit of discussion. This court cannot make a different construction in trust from what the rule of law requires in legal limitations. This is not like the case of articles; there is nothing left to the trustees to perform, except to buy the land; there is no direction to settle as in *Papillon v. Voice*, where the limitations were expressly repeated. When the land is bought, the limitations have been declared by the testator: it is to be the same as in the other lands.

The Solicitor-General, Wilbraham, and Ingram, for the heir-at-law; *Sewell*, for the executors.

We admit the real estate to be limited in such a manner as to give the plaintiff an estate tail; the sole question, therefore, is with regard to the money which is to be laid out. This is an executory trust, and the weight of the authorities upon that point prove that, as such, it ought to be settled as an estate for life, with remainder to the first and other sons in tail male. Lord King, in *Papillon v. Voice*, said, that in the case of an estate executory, the intent should take place, and not the strict rule of law. *Ashton v. Ashton*,¹ 14th November, 1734, at the Rolls. A devise of lands to be settled to A. for life, and after his death to the issue of his body; and for want of such issue, remainder over: a strict settlement decreed. *Allgood v. Withers*,² 4th July, 1735. A conveyance to trustees to apply the rents to A. for life, and after her death to the heirs of her body, and their heirs. Lord Talbot was of opinion that she only took an estate for life. In *Leonard v. Earl of Sussex*,³ which was a devise to trustees to settle a residuum, &c., it was held by the court that the intent to benefit the issue should be as strong in the case of an executory devise as in marriage articles. But it is said that the present case differs materially from *Papillon v. Voice*. That there is no reference to the trustees to settle; but it is impossible to carry the testator's intention into execution, without a settlement of some sort. It is said also that there was a difference in the repetition of the limitations; but how does that alter the case?

¹ Fearne's C. R. 120; cit. 1 Ves. 149; 2 Atk. 582.

² Cit. Fearne's C. R. 120; Burr. 1107; 1 Ves. 150; 2 Ves. 648; 2 Atk. 582.

³ 2 Vern. 526.

Words of relation must necessarily be of as great force and power as the words they are meant to refer to: they stand in their place, and are only inserted to prevent repetition, therefore the maxim that *verba relata inesse videntur* must give force to them. There are two rules of construction of wills: the one necessary and legal, the other (as in all cases of executory trusts) in compliance to the evident intent of the testator. Now here it was very plainly his intent (and the court may say so) to give an estate for life in both instances: that the words in the prior clause get the better of the intent from the necessary operation of the rule of law; but that in the other, the intent shall take place as far as it can.

THE LORD KEEPER. The only question in this cause and upon this will is, what estate John Austen is entitled to, according to the intent of the testator, to be collected from the face of his will, in the lands to be purchased with the residuum of his personal estate. It is agreed on both sides that he takes, by virtue of the limitations in the will, a legal estate tail in those lands which the testator calls his other freehold and gavelkind lands, though the limitations "thereof be to him expressly for life without impeachment of waste; remainder to trustees to support contingent remainders; and from and after his decease, in trust for the heirs of the body of John Austen, and for default of such issue, to the use and behoof of his own right heirs." And this is admitted on the authority of *Duncomb v. Duncomb*¹ and *Colson v. Colson*.²

It was said that these determinations were contrary to the intent of the testator from the necessity of the law which had imposed a rule that where an estate for life was created, and a limitation to the heirs of the body, those words must be taken as words of limitation, though the testator's intent was contrary. I said I knew no such rule with respect to wills; for that it was a maxim in law and equity, founded in obvious and everlasting good sense, that every man may (being supposed *inops concilii* at the time of making his will), by any words whatsoever, settle and devise his estate according to his intent, if that intent be agreeable to law. And therefore there must be a better ground than mere authority for making an express tenant for life tenant in tail, with a capacity to defeat the limitation to the heirs of his body. For in the case of *Duncomb v. Duncomb*, where the limitation was for life, remainder to trustees to support contingent remainders, remainder to the heirs of the body of tenant for life, though there were no contingent remainders to be supported, unless the latter words were taken as words of purchase, yet it does not appear to have been so much as questioned whether the word "heirs" was a word of limitation or of purchase. But the sole dispute was, whether the estate to the trustees prevented the merger of the estate for life in the estate tail.

¹ 3 Lev. 347.

² 2 Atk. 246.

The reason, therefore, why these words have been taken in these cases as words of limitation and not of purchase, seems to me to have been that the law, having fixed that meaning to the words, courts of justice could not say that the testator did not mean them to be accepted in that sense, but as words of purchase, unless there were other expressions made use of in the will, plainly evidencing that intent.

Therefore, in *Baile v. Coleman*,¹ an express estate for life, with a power of leasing, was not sufficient to explain those words differently from their original meaning. So in the case of *Legate v. Sewell*,² an express estate for life, with words of limitation superadded to words of limitation, was not sufficient for the reasons given in the arguments in *Shelley's Case*.³ So in *King v. Melling*,⁴ where the word "issue" was taken as a word of limitation, the express estate for life and the power to jointure were not sufficient indications of the testator's intent that the heirs should take as purchasers.

Yet these were all cases of wills, where, if the testator's intent had appeared to have been to have used the words in that sense, both courts of law and courts of equity ought to have given them operation and effect accordingly. For there can be no doubt but that, if a devise was made "to, or in trust for, I. S. for life, and after his death to the heirs of his body, such heirs to take as purchasers," courts of law and equity must interpret the word "heirs" in a sense contrary to their obvious meaning, and not as words of limitation to the heirs of the body of tenant for life.

But in the present case, the effect of the legal limitation not being questioned at the bar, I have only made these observations to show that these determinations are not arbitrary, but are founded, as appears to me, on sound and solid reasons.

But the contest here is, what estate John Austen is to have in the

¹ 2 Vern. 670. [Before Sir Simon Harcourt, K., Easter Term, 1711. "William Stowell by will devised lands to trustees and their heirs, for payment of debts and legacies; and after debts and legacies paid, willed that one fourth part should be and remain in trust for Elizabeth Baile, for and during the term of her natural life, with power of leasing for ninety-nine years, determinable on one, two, or three lives; and from and after her decease, in trust for her son Christopher Baile, for and during the term of his natural life, with like power of leasing; and after his decease, in trust for the heirs males of the body of the said Christopher, lawfully to be begotten.

"Lord Chancellor Cowper decreed the trustees to convey only an estate for life to Christopher Baile, and to his first and other sons in tail male.

"But upon a rehearing the Lord Keeper reversed that decree, and decreed an estate tail to be conveyed to Christopher, viz. to him and the heirs male of his body.

"Although he admitted, that upon articles of marriage founded on the agreement of the parties, the husband in such case might be made only tenant for life; but in a will you must take words as you find them." 1 P. Wms. 142, s. c. — ED.

² 1 Vern. 552; 1 P. Wms. 87.

³ 1 Co. 94.

⁴ 1 Vent. 225; 2 Lev. 58.

lands purchased by the residuum. It is said that this is an executory trust, and that it is a general rule in the case of an executory trust, that where an estate for life is given, together with a limitation to the heirs of the body, this court will take the words to be words of purchase, and direct a conveyance of the estate accordingly. The words "executory trust" seem to me to have no fixed signification. Lord King, in the case of *Papillon v. Voice*, describes an executory trust to be, where the party must come to this court to have the benefit of the will. But that is the case of every trust; and I am very clear that this court cannot make a different construction on the limitation of a trust than courts of law could make on a limitation in a will, for in both cases the intention shall take place. And it would be most dangerous to say that this court and a court of law could be warranted in raising different interests from the same words. Yet I am of opinion that the determinations on those cases, which are called cases of executory trusts (and particularly the case of *Papillon v. Voice*), are sound determinations.

That case was as follows: A. devised £10,000 to trustees, to be laid out in lands, and to be settled on B. for life, without impeachment of waste, and from and after the determination of that estate, to trustees and their heirs, during the life of B., to preserve contingent remainders; remainder to the heirs of the body of B., with remainders over; with a power to B. to make a jointure. Now, this executory trust, as it is called, is no declaration of the limitations of the estate, but is a sort of instruction, or heads of a settlement, which the trustees are directed to make; and as every trust is to be carried into execution according to the intent of the parties, it was impossible to decree an estate tail, consistent with such intent. The trustees were to settle the estate for life, with trustees to support contingent remainders; with a remainder (that is, a contingent remainder) to the heirs of his body, with remainders over. Now an estate tail would have been no settlement; and therefore, in articles for a settlement, it is of course. So in the case of *Leonard v. Earl of Sussex*, where the trustees were to settle the estate, so as the sons could not dock it. So in *Brampton v. Kynaston*, at the Rolls, 1728.

The result, therefore, seems to be that the rule with respect to trusts declared and legal limitations is the same. But in cases of imperfect trusts, left to be modelled by the trustees, and where, according to Lord Talbot's observation in *Lord Glenorchy v. Bosville*,¹ something is left by the creator of the trust to be done, the trusts ought to be executed in a more careful manner, or, in other words, the creator meant they should, and for that purpose has referred it to his trustees.

But to apply and inquire how far the case of *Papillon v. Voice* is in

¹ For. 3.

point. In that case the testator directed a settlement of the lands to be purchased. Those lands and the lands devised were independent of, and had no relation to, one another. And there was no more reason to argue the intent from one to the other, than if there had been two distinct devises of legal estates in the same will: one to A. for life, remainder to his first and other sons; the other to A. for life, remainder to the heirs of his body. Secondly, here is no reference to the trustees to settle, which is the strongest indication of the testator's intent. Thirdly, there is nothing left to the trustees to be done.

But then it was said, that if the limitations had been repeated, that it would have been the same with *Papillon v. Voice*. But I think not: because the testator refers no settlement to his trustees to complete; but declares his own uses and trusts, which being declared, I know no instance where the court has proceeded so far as to alter or change them.

The true criterion is this: wherever the assistance of the trustees, which is ultimately the assistance of this court, is necessary to complete a limitation, in that case, the limitation in the will not being complete, that is sufficient evidence of the testator's intention, that the court should model the limitations. But where the trusts and limitations are already expressly declared, the court has no authority to interfere and make them different from what they would be at law.

It must, therefore, be referred to the Master to take the usual accounts; and that the clear residue of the said testator's personal estate be invested in the purchase of lands of inheritance in fee-simple, to be approved of by the said Master, and that the defendants, the executors, do take conveyances thereof to them and their heirs, to the uses, intents, and purposes, and under and subject to the like charges, restrictions, and limitations as are by the said testator's will limited and declared of and concerning all and singular the said testator's freehold and gavelkind lands.¹

¹ *Jones v. Morgan*, 1 Bro. C. C. 206; *Brydges v. Brydges*, 3 Ves. Jr. 120; *Stanley v. Lennard*, 1 Eden, 95; *Garth v. Baldwin*, 1 Eden, 119; *Spence v. Spence*, 12 C. B. N. S. 199; *Carroll v. Renich*, 15 Miss. 798; *Dennis v. Geehring*, 7 Barr, 177; *Tillinghast v. Coggeshall*, 7 R. I. 383, *accord*. — Ed.

BLACKBURN v. STABLES.

IN CHANCERY, BEFORE SIR WILLIAM GRANT, M. R., JULY 15, 1813.
FEBRUARY 17, 19, 1814.

[Reported in 2 Vesey & Beames, 367.]

JOSEPH BLACKBURN, by his will, dated the 25th of May, 1787, devised as follows: "All the rest or remainder of my real and personal estate I give and bequeath in trust to my executors, Joseph Blackburn, my nephew and executor, and Miles Flesher, who married my great-niece; that is, for the sole use and benefit of a son of the said Joseph Blackburn, an executor at the age of twenty-four years; if he hath no son, to a son of my great-nephew Joseph Blackburn, son of my nephew Benjamin Blackburn; but if neither of these have a son, then to a son of my great-niece's daughter, Elizabeth Flesher," with a direction to take the name of Blackburn; "but on whomsoever such my disposition shall take place, my will is, that he shall not be put into possession of any of my effects till he attains the age of twenty-four years; nor shall my executors give up their trust till a proper entail be made to the male heir by him."

Joseph Blackburn, the executor, had not any son born at the death of the testator; but his wife was then *ensient* with the plaintiff, who was soon afterwards born, and had attained the age of twenty-four.

The bill prayed an account of the personal estate, and of the rents and profits of the real estate, &c.

Sir Samuel Romilly and *Mr. Johnson*, for the plaintiff. Though Joseph Blackburn, the executor, had, at the death of the testator, no son born, the son then in *ventre sa mère*, and afterwards born, may be considered as having been in the testator's contemplation; such child being considered as in existence for his benefit. *Swinburne*, 487, *Beale v. Beale*,¹ *Northey v. Strange*,² and many other cases.

2dly. This is either an estate tail in the plaintiff, or in his first son; if *Archer's Case*³ is applicable, the intention to entail this estate being declared. In all the cases of executory trust there was some indication of an intention, that care should be taken to prevent the first taker from cutting off the entail. That is expressly stated in the great case of *Leonard v. The Earl of Sussex*,⁴ upon which all the others proceed; and there is no instance of abridging the first estate without some foundation for the inference of a strict entail, which the first taker should not have the power of determining; in other words, an inten-

¹ 1 P. Wms. 244.

² 1 P. Wms. 340.

³ 1 Co. 66.

⁴ 2 Vern. 526.

tion to make the estate unalienable, as long as the rules of law would permit. Here is no foundation for that inference, as there was in *Papillon v. Voice*, from the express words, "estate for life without impeachment of waste." The only distinct object of this testator, the perpetuation of his name, would not in some events be answered by an estate for life only.

Mr. Barber, for the defendants, objected to the devise as being void : first, for uncertainty. Doe on the Demise of *Hayter v. Joinville*.¹

2dly. As too remote. *Lade v. Holford* ;² *Phipps v. Kelynge* ;³ *Stephens v. Stephens* ;⁴ *Taylor v. Biddal* ;⁵ *Long v. Blackall*.⁶

Sir Samuel Romilly, in reply, answered the objection of uncertainty by observing, that, as there was but one child, the event rendered the object certain.

THE MASTER OF THE ROLLS, on making the decree in the first instance in the plaintiff's favor, observed, that it is perfectly settled that a child in *ventre sa mère* is to be considered as in existence for his benefit ; and *Thellusson's Case*⁷ went farther, where it was held that such a child should be so considered to his disadvantage ; those who supported the will relying upon the distinction, that for his advantage he was to be so considered.

THE MASTER OF THE ROLLS. It seems clear that this is an executory trust, and I know of no difference between an executory trust in marriage articles and in a will, except that the object and purpose of the former furnish an indication of intention, which must be wanting in the latter. When the object is to make a provision by the settlement of an estate for the issue of a marriage, it is not to be presumed that the parties meant to put it in the power of the father to defeat that purpose, and to appropriate the estate to himself. If, therefore, the agreement is to limit an estate for life, with remainder to the heirs of the body, the court decrees a strict settlement in conformity to the presumable intention ; but if a will directs a limitation for life, with remainder to the heirs of the body, the court has no such ground for decreeing a strict settlement. A testator gives arbitrarily what estate he thinks fit. There is no presumption that he means one quantity of interest rather than another, an estate for life rather than in tail or in fee. The subject being mere bounty, the intended extent of that bounty can be known only from the words in which it is given ; but if it is clearly to be ascertained from anything in the will that the

¹ 3 East, 172.

² 3 Bur. 1416.

³ In chancery, before Lord Camden, 20th July, 1767 ; *Fearn. Ex. Dev.* (4th ed., by Powell), 84, stated from the Register's Book, 2 Ves. & B. 57.

⁴ For. 228.

⁵ 2 Mod. 289 ; 1 Eq. Ca. Abr. 188 ; *Freem.* 243.

⁶ 3 Ves. 486 ; 7 T. R. 100.

⁷ 4 Ves. 227.

testator did not mean to use the expressions which he has employed in their strict, proper, technical sense, the court, in decreeing such settlement as he has directed, will depart from his words in order to execute his intention; but the court must necessarily follow his words, unless he has himself shown that he did not mean to use them in their proper sense; and have never said that, merely because the direction was for an entail, they would execute that by decreeing a strict settlement.

Let us see, then, what estate the plaintiff would have according to the literal import of the direction in this will.

Certainly the "male heir by him" cannot be the first taker: there must be some estate limited to the ancestor, and the male heir can only take by way of remainder. Suppose the limitation made to the plaintiff, either generally or for life, the remainder will be "to the male heir by him," that is, to the heirs male of his body, which would make an estate tail in the plaintiff; as it is settled that the words "heir" or "heir male of his body," in the singular number, are words of limitation, not of purchase; unless words of limitation are superadded,¹ or there is something in the context to show that the testator did not mean to use the words in their technical sense. But there is nothing in the context of this will from which that can be collected. Here is an absence of every circumstance that has commonly been relied on as showing such intention. The word is "heir," not "issue." There is no express estate for life given to the ancestor; no clause that the estate shall be without impeachment of waste; no limitation to trustees to preserve contingent remainders; no direction so to frame the limitation that the first taker shall not have the power of barring the entail. Everything is wanting that has furnished matter for argument in other cases. The words are therefore to be taken in their legal acceptance.

The consequence is, that I must declare the plaintiff entitled to have the conveyance made to him in tail male.²

¹ Archer's Case, 1 Co. 66.

² In the following cases of executory trusts the rule in Shelley's Case was held to apply: *Sweetapple v. Bindon*, 2 Vern. 536; *Legatt v. Sewell*, 2 Vern. 551 (*semble*); *Seale v. Seale*, 1 P. Wms. 290; *Harrison v. Naylor*, 2 Cox, 247; *Dodson v. Hay*, 3 Bro. C. C. 404; *Cusack v. Cusack*, 5 Bro. P. C. (Toml. ed.) 116; *Marshall v. Bousfield*, 2 Mad. 166; *Britton v. Twining*, 3 Mer. 176; *Scarisbricke v. Skelmersdale*, 4 Y. & C. 78, 117; *Webb v. Shaftesbury*, 3 M. & K. 599; *Herbert v. Blunden*, 1 Dr. & Wal. 78. — Ed.

MOORE v. CLEGHORN.

IN CHANCERY, BEFORE LORD LANGDALE, M. R., JULY 13, 28, 1847.

[Reported in 10 Beavan, 423.]

THE testator, Robert Cleghorn, after directing his debts, &c., to be paid, "in the first place" devised some freehold and also some copyhold property which he had surrendered to the use of his will, "unto and to the use of Eumenes Moore, George Christopher, and James Ensor, their heirs and assigns for ever, upon trust for the use and benefit of his natural mustee boys, Ralph Brush Cleghorn, Thomas Paice Cleghorn, and Matthew Cole Cleghorn, begotten by him on the body of Margaret Steele, a free mulatto woman, of the island of St. Christopher, in the West Indies, the rents, issues, and profits to be paid for the maintenance and education of his said before-mentioned sons, Ralph, Thomas, and Matthew, or to the survivor or survivors of them, share and share alike." And he devised another property to the same trustees for the use of Margaret Steele for life, and at her decease to her children, Ralph, Thomas, and Matthew, or the survivor or survivors of them.

The trustees were appointed executors.

The testator died in 1824, leaving his three natural children surviving. One of them, namely, Matthew Cole Cleghorn, died in 1832, without issue or heirs, and the crown claimed his property (if any) by escheat. A second child, Ralph, died in 1842, after severing the joint tenancy (if any); and Thomas was still living.

A bill having been filed for the administration of the testator's estate, a question arose as to the construction of the devise contained in his will.

Mr. Kindersley and *Mr. Pitman*, for the plaintiffs, the trustees.

Mr. Turner and *Mr. Stevens*, for Thomas P. Cleghorn, contended that the three children took equitable estates in fee as joint tenants. The limitation to the trustees being in fee "upon trust for the use and benefit" of the natural children, it followed that the interest of the children was coextensive with that of the trustees. *Knight v. Selby*;¹ *Bateman v. Roach*.² They argued that the words expressive of joint tenancy prevailed over the words "share and share alike."³

¹ 3 Scott N. R. 409, and 5 Man. & Gr. 92; and see *Challenger v. Sheppard*, 8 T. R. 597.

² 9 Mod. 104.

³ See *Barker v. Gyles*, 2 P. Wms. 280; 3 B. P. C. 104; *Blissett v. Cranwell*, Salk. 226, and 3 Lev. 373; *Stones v. Heurtley*, 1 Ves. Sen. 165; *Smith v. Horlock*, 7 Taunt. 129; *Doe d. Littlewood v. Green*, 4 M. & W. 229; *Stringer v. Phillips*, 1 Eq. Ca. Abr. 292, pl. 11; *Lord Bindon v. E. Suffolk*, 1 P. Wms. 96.

Mr. Lloyd, for Brooks, claiming under Ralph.

Mr. Wray, for the Attorney-General, argued that the children took legal estates as tenants in common in fee, and he claimed one-third for the crown; and at all events the intermediate rents, they being of the nature of personalty and held in trust for the crown. *Middleton v. Spicer*.¹ He admitted he could not argue against the authority of the case of *Burgess v. Wheate*.²

Mr. Purvis, *Mr. Schomberg*, and *Mr. Bilton*, for the heirs of the testator, argued that the legal estate was in the trustees only to apply the rents during minority; that the children took life-estates only, there being no words of limitation, and no use of the word "estate," and that, therefore, the reversion belonged to the heirs of the testator, as a resulting trust. *Doe dem. Lean v. Lean*; ³ *Gall v. Esdaile*.⁴

Mr. Briggs and *Mr. Micklethwait*, for other parties.

Mr. Turner, in reply, cited *Byng v. Lord Strafford*.⁵

THE MASTER OF THE ROLLS said that the inclination of his opinion was, that they took equitable estates as joint tenants; but he reserved his judgment.

THE MASTER OF THE ROLLS. By the devise to the three trustees, their heirs and assigns for ever, the whole estate and interest of the testator in the land passed to them; but the testator declared that the gift was "upon trust for the use and benefit" of the three boys. Everything, therefore, which the trustees took was given to them in trust for the use and benefit of the three boys. I think, therefore, that there is no resulting trust to the testator or his heirs.

Next, how are the three boys to take? The first words, the rents to be paid for the maintenance and education of the three children, or to the survivors or survivor of them, are such as would make them joint tenants. The subsequent words, "share and share alike," render it doubtful, for they would make them tenants in common.

There is some difficulty in the construction; but, on the whole, I think the boys take equitable estates in fee, as joint tenants.⁶

¹ 1 Bro. C. C. 201.

² 1 Eden, 177.

³ 1 Q. B. Rep. 229.

⁴ 1 Russ. & M. 540, and 8 Bing. 323; 2 Jarman on Wills, 177, 178.

⁵ 5 Beav. 558.

⁶ Affirmed 12 Jur. 591; *Challenger v. Sheppard*, 8 T. R. 597, *Knight v. Selby*, 3 M. & G. 92; *Doe v. Cafe*, 7 Ex. 675, 683 (*semble*); *Hodson v. Ball*, 14 Sim. 558, *accord*.

Conf. *Pollard's Trusts*, 32 L. J. Ch. 657. — Ed.

HOLLIDAY v. OVERTON.

IN CHANCERY, BEFORE SIR JOHN ROMILLY, M. R., FEBRUARY 21,
MARCH 30, 1852.

[*Reported in 15 Beavan, 480.*]

THE question now under discussion was, whether, under a marriage settlement, the children took estates for life or in fee. The facts of the case were as follows:—

In 1825, Mary Heathcote, a widow, being about to marry Edmund Drayton, and having children of her first marriage, a settlement of her real and personal estate was executed, whereby, after reciting that it was agreed to settle the property for her separate use for life, and, after her decease, for making “the reversion and principal trust a provision for the children of her former marriage (subject, nevertheless, to a power of appointment on the part of Mary Heathcote, by will or testamentary instrument, to be executed in manner thereafter provided),” she proceeded to convey the property to a trustee, his heirs, executors, administrators, and assigns, in trust for her separate use for life, and, after her decease, in trust for such persons as she by her will, during the intended coverture, should appoint; and, in default of such appointment, “in trust for the children of Mary Heathcote, equally to be divided between them, share and share alike, as tenants in common, and not as joint tenants.” Mary Heathcote survived her second husband, and died in 1848. There were no children of the second marriage.

It was on a former occasion held that she had not executed the power of appointment;¹ and the question then arose, what estate the children took, there being no limitation to their “heirs.” The court thought that they took for life only; but there being some doubt as to the real terms of the settlement, the case was, with the permission of the court, reheard on that point only.

Mr. Lloyd and *Mr. Speed*, for the plaintiffs, argued that the children took life-estates only.

Mr. Amphlett, on the part of the children, now argued that they took in fee. He rested his argument on the three following points:—

First. The recital, which may be regarded for the purpose of controlling the operative part of the deed (*Fletcher v. Lord Sondes*²), shows an intention to settle “the reversion and principal” on the children, *i.e.* that they should take a fee-simple; and the settlement being executory, and the estates equitable, there is no need to reform it, but,

¹ 14 Beav. 467.

² 1 Bl. N. s. 144.

in this court, full operation will be given to it, according to the true intention of the parties.

Secondly. The children of the former marriage are purchasers for value, *Newstead v. Searles*; ¹ and in the declaration of the uses to such purchasers, the omission of the word "heirs" will not deprive them of the fee. Littleton likewise says, "That a man shall not have a fee-simple by a feoffment or grant without these words, 'his heirs.' And yet the law is plain, that if a man had, before the statute of 27 Henry VIII., bargained and sold his land for money without these words, 'his heirs,' the bargainee hath a fee-simple. And the reason is, because by the common law nothing passeth from the bargainor but a use, which is guided by the intent of the parties, which was to convey the land wholly to the bargainee; and forasmuch as the law intends that the bargainee paid the very value of the land, therefore in equity, and according to the meaning of the parties, the bargainee had the fee-simple without these words, 'his heirs,' as it is held in 27 Hen. VIII. fol. 5; 4 Edw. VI.; *Br. Estates*, 78; 6 Edw. VI.; and in the time of Hen. VIII.; *Br. Conscience*, 25." ²

Thirdly. The estate of the *cestuis que trust* is commensurate with that of their trustees; and, as the trustees take a fee-simple, the children's estate is coextensive. *Moore v. Cleghorn*; *Knight v. Selby*; ³ *Challenger v. Shepherd*.⁴

Mr. Lloyd, in reply. The settlement is executed, and not executory, and the estate of the children is limited by the plain words of the trust, which cannot be extended by the recital.

Secondly. The children of a former marriage are not within the marriage consideration, or purchasers; ⁵ and, if they were, they are purchasers, not of the fee, but of the estate for life limited to them by the settlement.

Thirdly. The rule laid down in *Moore v. Cleghorn* applies to wills, and has never been extended to the construction of deeds.⁶

The Master of the Rolls said he would reserve his judgment.

THE MASTER OF THE ROLLS. On this case I reserved my judgment on one point only. The question originally raised by the claim was, whether the power given to the wife was one which could be executed by her when not under coverture, and I was of opinion that the words of the deed limited the exercise of the power to the period of coverture. But, in the course of the argument, it appeared that the

¹ 1 Atk. 265.

² *Shelley's Case*, 1 Co. Rep. 100; *Shep. Touch.* 522.

³ 3 Scott N. R. 409, and 3 Man. & Gr. 92.

⁴ 8 T. R. 597.

⁵ *Johnson v. Legard*, Turn. & R. 281, and 6 Maule & Selw. 60; *Cotterell v. Homer*, 13 Sim. 506.

⁶ *Snell v. Silcock*, 5 Ves. 469.

gift over in default of appointment was in these words; viz., "In trust for the children of Mary Heathcote, equally to be divided between them, share and share alike, as tenants in common, and not as joint tenants," and not containing any words of inheritance, and which, therefore, according to the ordinary rule of construction in such cases, would have restricted the interest taken by the children to life-estates. The claim stood over for the purpose of Mr. Amphlett considering whether any distinction could be found in the circumstances of this case to alter or prevent the application of the general rule, and accordingly several arguments and authorities were adduced for this purpose; but, after an attentive consideration of them, I am of opinion that they do not affect this case.

It was first endeavored to bring this case within the rule applicable to executory instruments, on the ground that this was a contract to convey the fee, and that the children were purchasers within the contract. There is, however, nothing executory in the frame of this instrument. It is, to all intents, a deed executed, and which does not require any further or additional instrument to give it validity.

It was further contended that, upon the true construction of this instrument, the children must be considered as purchasers, and that, being purchasers, this gives a construction to the declaration of trust, which will vest the fee in these children, without the necessity of employing any words of inheritance for this purpose. Sheppard's Touchstone¹ and a passage in Shelley's Case² were cited to establish this position. The passage in Sheppard's Touchstone is to the effect that, in the case of a purchaser for valuable consideration, a declaration of the use to the purchaser, omitting the word "heir," will not deprive him of the fee. The passage in Coke's Reports is to the same effect. It refers to a case where the words of the instrument are governed by the intent of the parties, for the purpose of showing that a use before the statute of 27 Hen. VIII. was merely regarded as a trust. It is to this effect, "that a man shall not have a fee-simple by a feoffment or grant without these words, 'his heirs;' and yet the law is plain, that if a man had before the statute of 27 Hen. VIII. bargained and sold his land for money, without these words, 'his heirs,' the bargainee hath a fee-simple. And the reason is, because by the common law nothing passeth from the bargainor but a use, which is guided by the intent of the parties, which was to convey the land wholly to the bargainee; and forasmuch as the law intends that the bargainee paid the very value of the land, therefore in equity, and according to the meaning of the parties, the bargainee had the fee-simple without these words 'his heirs,' as it is held in," &c.; and then he refers to the Year Books to establish that proposition.

¹ Page 522.

² 1 Co. Rep. 100.

Undoubtedly, if the children mentioned in this settlement could be considered as purchasers within the meaning of that word, as employed in these passages, some argument might be founded on those authorities; but, in truth, the observation that the children are purchasers within the meaning of the settlement does not advance the argument a single step. They are not purchasers of the fee, or of any estate of inheritance under any contract; but though they are purchasers within the marriage contract, they are merely purchasers of such interest as the settlement gives them, which brings it back to the former question, viz. what the interest is which is given them by that settlement; and this is a mere question of intention.

The case of *Newstead v. Searles*,¹ to which I am also referred, does not advance the case beyond what I have already stated.

It is then attempted to control the limitations contained in the deed by the force of the recitals contained in the deed; but, even if this were admissible, it would not advance the argument, for in these recitals there is, in my opinion, nothing leading to the conclusion that the children were to take the fee; on the contrary, the recital is simply for the purpose of making a provision for the children upon the trusts after-mentioned. And this obviously leaves the trusts, &c., to be construed according to such import as the court should think the correct one, to be applied to the words employed in them.

The cases of *Challenger v. Shepherd*,² *Knight v. Selby*,³ and *Moore v. Cleghorn* were all cases of wills, where, upon the true construction of the words of the will, the court held that the fee passed to the devisee, although the word "heirs" was omitted. But the rules applicable to the construction of wills or of executory instruments are not, in truth, applicable to the present case, which is the simple case of a deed executed, where I am bound by the strict rules which are applicable to a case of that description.

I must therefore hold that the children take life-estates only under this limitation, in default of the due execution of the power.⁴

¹ 1 Atk. 265.

² 8 T. R. 597.

³ 3 Scott N. R. 409, and 3 Man. & Gr. 92.

⁴ *Lucas v. Brandreth*, 28 Beav. 274; *Tatham v. Vernon*, 29 Beav. 604; *Middleton v. Barker*, W. N. (1873) 231; *Nelson v. Davis*, 35 Ind. 474, *accord*.

Conf. McClintock v. Irvine, 10 Ir. Ch. 480; *Brenan v. Boyne*, 16 Ir. Ch. 87; *Betty v. Elliott*, 16 Ir. Ch. 110, n.; *Re Bayley*, 16 Ir. Ch. 215. — Ed.

THOMPSON v. FISHER.

IN CHANCERY, BEFORE SIR W. M. JAMES, V. C., MAY 31, 1870.

[*Reported in Law Reports, 10 Equity, 207.*]

ROBERT FISHER, by his will, dated the 5th of December, 1829, after leaving certain property to his wife Mary Fisher, and to Ruth Fisher, his daughter, devised and bequeathed the residue of his landed property, as well freehold as leasehold, to trustees, upon trust for his wife Mary Fisher, for her life or during widowhood, and after her decease or second marriage, whichever should first happen, upon trust, that the trustees should convey, assign, and assure all his seven houses in Queen Street and on the north side of Ann Street, also his malt-kiln and garden behind the same, and also the three cottages in Bridge Lane, all situate respectively in Lancaster aforesaid, and every of them, with their appurtenances, "unto and to the use of my son Thomas Fisher and the heirs of his body lawfully issuing, but in such manner and form, nevertheless, and subject to such limitations and restrictions, as that, if the said Thomas Fisher shall happen to depart this life without leaving lawful issue, then that the said hereditaments and premises and every of them may after his decease descend unincumbered unto and belong to my daughter, the said Ruth Fisher, her heirs, executors, administrators, and assigns, according to the respective nature and tenure thereof."

The testator died in November, 1834; Mary Fisher, his widow, died in 1857. Ruth, his daughter (wife of Michael Thompson), died in September, 1866, leaving the plaintiff, Robert Fisher Thompson, her eldest son and heir-at-law.

Thomas Fisher and his wife were both past seventy, and there had never been any issue of their marriage.

The property described in the devise, with the exception of the Bridge Lane cottages (which were leasehold), was freehold, of which testator was seised in fee-simple. Certain conveyances of the property comprised in the above devise had been executed by Thomas Fisher, and these conveyances proceeded on the assumption that he was entitled under the will to be made tenant in tail of the freehold property thereby conveyed.

The plaintiff, R. F. Thompson, on the other hand, insisted that, according to the true construction of the will, Thomas Fisher became entitled to an estate for his life only, with a limitation over in favor of testator's daughter Ruth, and that the direction for such conveyance was an executory trust to be executed by a limitation to Thomas Fisher

for life, with remainder in favor of his issue as purchasers in tail, with remainder to Ruth Thompson in fee. As heir-at-law of Ruth Thompson, the plaintiff claimed to be entitled to the property in fee-simple, subject to the life-estate of Thomas Fisher and the limitations over in favor of his issue.

The bill was filed to carry the trusts of the will into execution, to obtain a declaration to the above effect, and to set aside the conveyances made of the property by Thomas Fisher, and in lieu thereof that proper assurances might be made.

Mr. Joshua Williams, Q. C., and *Mr. Marten*, for the plaintiff, contended that an executory trust had been created by the will; and that the court in such case, looking at the testator's intention, would endeavor to give the fullest possible effect to that intention, by moulding what remained to be done so as to carry it into execution to the extent of disregarding the technical sense of the language used by the testator. *Leonard v. Lord Sussex*; ¹ *Shelton v. Watson*; ² *Davenport v. Davenport*; ³ *Lewin on Trusts*.⁴

Mr. Eddis, Q. C., and *Mr. Harrison*, for the defendants, contended that an estate tail was created in Thomas Fisher, and that the court would not give effect to the supposed general intention (of benefit to Ruth Fisher after the death of her brother without issue), as against the particular intention shown by the use of technical language, to which full legal effect could only be given by construing the devise as an estate tail. *Ex parte Wynch*; ⁵ *Doe v. Gallini*; ⁶ *Seale v. Seale*; ⁷ *Blackburn v. Stables*; *Ex parte Davies*; ⁸ *Egerton v. Earl Brownlow*; ⁹ *Coltsman v. Coltsman*; ¹⁰ *Viscount Holmesdale v. West*.¹¹

SIR W. M. JAMES, V. C. The case is, I think, clear, both upon principle and on authority. Referring to the distinction between an executory trust and a trust executing itself, stated by Lord St. Leonards in *Egerton v. Earl Brownlow*: ¹² "Has the testator been what is called, and very properly called, his own conveyancer? Has he left it to the court to make out from general expressions what his intention is, or has he so defined that intention that you have nothing to do but to take the limitations he has given to you and to convert them into legal estates?" — this is as exactly the case of an executory trust as could be. The testator has not been his own conveyancer. He has directed the trustees to convey, assign, and assure the property "unto and to the use of my son T. F. and the heirs of his body lawfully issuing, but in such manner and form, nevertheless, and subject to such limita-

¹ 2 Vern. 526.² 16 Sim. 543.³ 1 H. & M. 775.⁴ Pages 86-99.⁵ D., M. & G. 188, 207.⁶ 5 B. & A. 621.⁷ 1 P. Wms. 290.⁸ 2 Sim. N. s. 114.⁹ 4 H. L. C. 1, 210, 211 (opinion of Lord St. Leonards).¹⁰ Law Rep. 3 H. L. 121.¹¹ Law Rep. 3 Eq. 474.¹² 4 H. L. C. 210.

tions and restrictions, as that, if T. F. shall happen to die without leaving lawful issue, then," &c. These words evidently contemplated some further instrument in order to complete the limitations, which must have effect given to them so far as the law allows. The declaration, in accordance with the prayer of the bill, will be that the will created an executory trust to be executed by a conveyance to the use of Thomas Fisher during his life, with remainder to his first and other sons and daughters as purchasers in tail, with remainder to testator's daughter Ruth in fee.¹

¹ *Sackville-West v. Holmesdale*, L. R. 4 H. L. 543; *Wood v. Burnham*, 6 Paige, 513, 26 Wend. 9, s. c.; *Edmondson v. Dyson*, 2 Ga. 307; *Berry v. Williamson*, 11 B. Mon. 245 (*semble*); *Porter v. Doby*, 2 Rich. Eq. 49; *Loving v. Hunter*, 8 Yerg. 4, *accord*.

In *Sackville-West v. Holmesdale*, *supra*, Lord Westbury said, p. 565: "My Lords, an executory trust may be created by an agreement or direction to make a settlement or conveyance. Such a trust is executory in this peculiar sense, that it is fulfilled or exhausted when the contemplated settlement or conveyance has been made. The subjects of trusts in general are the ownership, management, and enjoyment of property, and in that sense all trusts are executory; but the subject of an executory trust, properly so called, is the particular deed or instrument which is to be made, and not the property which is comprised in it. An executory trust will be carried into effect by a court of equity according to the intention of the parties, as collected from the words of the agreement or direction, provided such agreement or direction be within the limits of legality.

"In construing the words creating an executory trust, a court of equity exercises a large authority in subordinating the language to the intent. Thus, in marriage articles containing an agreement that his estate shall be settled on the intended husband for life, and then on the heirs of his body, a court of equity discerns an intention that the issue shall take as purchasers; and it refuses, therefore, to give to the words 'heirs of the body' their proper effect and meaning at common law, but directs a settlement on the first and other sons in tail. In this case, the words 'heirs of the body' are neither informal nor imperfect; but their legal effect is overruled by the intention."

In *Boswell v. Dillon*, Drury, 291, Sir E. B. Sugden, C., said, p. 297: "Every trust is, it is true, in a certain sense, executory. Where, however, there is a trust the nature and extent of which is ascertained we are not in the habit of calling it an executory trust. By the term 'an executory trust,' when used in its proper sense, we mean a trust in which some further act is directed to be done. Executory trusts in this way may be divided into two classes: one in which, though something is required to be done, — for example, a settlement to be executed, — yet the testator has acted as his own conveyancer, as it is called, and defined the settlement to be made; and the court has nothing to do but to follow out and execute the intentions of the party as appearing on the instrument. Such trusts, though executory, do not differ from ordinary limitations, and must be construed according to the principles applicable to legal estates depending upon the same words. The other species of executory trust is where the testator, directing a further act, has imperfectly stated what is to be done. In such cases the court is invested with a larger discretion, and gives to the words a more liberal interpretation than they would have borne if they had stood by themselves."

— Ed.

CHAPTER VIII.

NATURE OF A CESTUI QUE TRUST'S INTEREST IN THE
TRUST PROPERTY.

SECTION I.

A Cestui que Trust has no Rights except in Equity.

ANONYMOUS.

IN THE COMMON PLEAS, EASTER TERM, 1462.

[Reported in Year Book, 2 Edward IV., folio 2, placitum 6.]

MOYLE, J., said that when F. is obligee to the use of G. that G. may have a subpœna against the obligee to make him sue the obligor, *quod* DANVERS, J., *concessit* and said that the law was the same where my feoffee upon confidence is disseised, in which case I should have a subpœna to compel him to bring an assize, &c.¹

ANONYMOUS.

IN THE COMMON PLEAS, EASTER TERM, 1464.

[Reported in Year Book, 4 Edward IV., folio 7, placitum 9.]

IN a writ of trespass *quare vi et armis clausum suum fregit*, &c., *et arbores succidit*, &c., *et herbas conculcavit et consumpsit*, &c.

Catesby. You should have no action, for we say that a long time before the supposed trespass one J. B. was seised of certain land, &c., the place where, &c., in fee, and being so seised enfeoffed the plaintiff thereof in fee to the use of the defendant, &c., upon confidence, and afterwards the defendant by the sufferance and will of the plaintiff occupied this land and cut trees upon the same and trampled the grass, which is the same trespass, &c.

¹ "Note that it was held by the justices that a feoffee in trust is bound to plead all pleas and maintain actions for the land as he to whose use, &c., would plead, but this shall be at the cost of *cestui que use*." Y. B. 7 Ed. IV., fol. 29, pl. 15. — Ed.

Jenney. This is no plea, for there is no certain matter, for such sufferance and will cannot be tried; and in such case to make a good issue or traversable matter, he should plead a lease by the plaintiff to the defendant to hold at will, which is traversable and may be tried.

Catesby. Why shall he not plead this matter when it follows reason that the defendant enfeofed the plaintiff to the defendant's use and so the plaintiff is in reason in this land only to the defendant's use, and the defendant made the feoffment upon trust and confidence, and the plaintiff suffered the defendant to occupy the land, so that in reason the defendant occupied at his will, which proves that the defendant shall therefore have the advantage of pleading the feoffment in trust to justify the occupation, &c.

MOYLE, J. This would be a good matter in the chancery, for the defendant there shall plead the intent and purpose upon such feoffment, for by conscience one shall have remedy in the chancery, according to the intent of such a feoffment; but here by the common law in the Common Bench or King's Bench it is different, for the feoffee shall have the land, and the feoffor shall not justify against his own feoffment, whether the feoffment was upon confidence or not.

Catesby. The law of chancery is the common law of the land, and if there the defendant shall have advantage of such a feoffment, why not likewise here?

MOYLE, J. That cannot be in this court as I have told you, for the common law of the land varies in this case from the law of chancery, &c.

ANONYMOUS.

IN THE COMMON PLEAS, TRINITY TERM, 1500.

[Reported in Year Book, 15 Henry VII., folio 12, placitum 23, 15 Henry VII., folio 2, placitum 4, and 15 Henry VII., folio 13, placitum 1.]

NOTE BY ALL THE COURT. The feoffor upon confidence cannot justify the taking of cattle damage feasant in the land of the feoffees, which they hold to his use, in his own name, nor make avowry for damage feasant in his own name, but in the name of the feoffees; for otherwise the trespasser would be twice punished. For the feoffees upon confidence have an action against the feoffor at common law, if he enters upon the land except to make a feoffment, as well as against other strangers. For feoffor is only a trespasser to the feoffee by his occupancy at the common law. And therefore the feoffor who is only a trespasser cannot justify the taking of cattle of a stranger damage feasant,

for he cannot have the amends for the trespass, but the feoffee. And the statute of 1 Richard III. c. 1, was not made for the advantage of the feoffor, but for the benefit of purchasers from the feoffor. So the power of the feoffor is not enlarged by this statute except to enter and straightway make a feoffment. . . . Nor can a feoffor have an action of trespass against a stranger, for a feoffor is only a trespasser; nor is the case like that of a disseisor, for the feoffor shall not be called a disseisor unless he occupies against the will of the feoffee.

FROWYK, C. J. If one makes feoffment upon confidence to another in fee, and the feoffee dies, and the land descend to his heir, the confidence and use is determined because the feoffor places no confidence in the heir of the feoffee, but only in the feoffee. *Quære*. And although the feoffor is sworn upon the inquest by reason of the use, this does not prove that he has an interest in the land. For the statute¹ was made because of the mischief of the sheriffs empanelling simple persons and of small conscience, and so they made the statute that those of substance should be empanelled who understand good conscience. And at the making of the statute the greater part of the land in England was in feoffments upon confidence. And therefore the intent of those who made the statute was not that *cestui que usent* should not be sworn, for then there would be but few men who could sit upon juries. And although this construction is against the words of the statute, still we ought to allow it because it was the intention of the makers.

MEGOD'S CASE.

IN THE QUEEN'S BENCH, MICHAELMAS TERM, 1585.

[Reported in Godbolt, 64.]

THE case was, that a feoffment was made unto another man, *ad eam intentionem*, that he should convey the same to such a one, to whom he sold it; and he sold the same to another, and did refuse to convey it, and therefore the other brought an action upon the case. And GAUDY, Justice, held that the action would lie. But SUIT, Justice, held the contrary. WRAY, Chief Justice, did agree with GAUDY: for he said, it was a trust, that he should assure it to another. And it is a good consideration in the chancery: the conveyance of a trust, and thereupon an action upon the case will lie.²

¹ 2 Hen. V., st. 2, c. 3. — Ed.

² In *Jevon v. Bush*, 1 Vern. 342, 344, it is reported that Lord Jeffries, C., "cited my Lord Hobart, who says that *cestui que trust* in an action on the case against his trustee shall recover for a breach of trust in damages." In *Smith v. Jameson*, 5 T. R. 601,

DHEGETOFT AND ANOTHER v. THE LONDON ASSURANCE
AND ANOTHER.

IN CHANCERY, BEFORE LORD KING, C., JANUARY 15, 1728.

[*Reported in Mosely, 83.*]

THE plaintiffs are foreigners and copartners, who fitted out a ship from Ostend to China, and back again; and the defendant, D'Goniegh, their agent, insured the ship and cargo here in England by the other defendants, and took the policy in his own name. The ship proceeded on her voyage and called in at Bencolen, where the governor seized her as an interloper, and disposed of her and the cargo. Upon which the plaintiffs brought this bill, setting forth that the policy was taken in the name of D'Goniegh, their trustee, and that he refuses to let them sue the other defendants in his name; that the facts happened abroad, and that their witnesses who could prove them were beyond seas; and therefore they pray a discovery and relief. And the defendants demurred to the relief; and their counsel said, that the same demurrer was allowed by his Lordship the 15th of January, 1727, in the case of

Buller, J., said, p. 603: "With regard to the other point made, that a breach of trust may not be the ground of an assumpsit, there is not an abridgment in the law which does not contradict such a proposition." See also *Bennett v. Preston*, 17 Ind. 291; *Newhall v. Newhall*, 7 Mass. 198.

But in *Barnadiston v. Soame*, 6 How. St. Trials, 1063, Lord North, C.J., said, p. 1098: "No action upon the case will lie for breach of a trust, because the determination of the principal thing, the trust, does not belong to the common law, but to the Court of Chancery." In *Sturt v. Mellish*, 2 Atk. 610, Lord Hardwicke, C., said, p. 612: "A trust is where there is such a confidence between the parties, that no action at law will lie; but is merely a case for the consideration of this court."

Ex parte THOMAS JENKINS.

IN THE KING'S BENCH, EASTER TERM, 1823.

[*Reported in 1 Barnewell & Cresswell, 655.*]

THOMAS JENKINS being brought up on a writ of *habeas corpus*, Taunton moved to discharge him out of custody, on the ground of insufficiency in the writ *de contumace capiendo*, by which it appeared that a suit had been instituted against Thomas Jenkins, in the character of a trustee, under the will of one Mary Davis; and that the payment of the sum of £451 had been decreed against him in the same character. The objection was, that as the Ecclesiastical Court has no jurisdiction over trusts, it was not competent to them therefore to make such a decree, and as the defect appeared on the face of the writ, the defendant was entitled to his discharge. And the court being of this opinion, the rule was granted. (a)

(a) *Barker v. May*, 4 M. & Ry. 386, *accord.* — ED.

D'Silva v. Wall and Others, where the policy was on a Portuguese ship, and it was suggested in the bill that the witnesses were Portuguese, and lived abroad, and that the expenses of bringing them over on a trial would be more than the cause would bear, and that their trustee would not let them bring an action in his name; yet his Lordship was of opinion that they must recover at law as well as they could, and had no title to be relieved here; that it was the common suggestion in every bill that the witnesses were beyond seas, that policies were generally taken in the name of a trustee, and that if he refused to let the action be brought in his name, a bill might be filed against him to compel him to it.

The counsel for the plaintiffs insisted that if they had filed their bill against the trustee only, he would have demurred, because they had not made the London assurance parties, who might have satisfied them, and that they had brought a proper bill, and that they ought either to have the liberty to use the name of the defendant their trustee, or to have a remedy against the other defendants; that the demurrer ought to be overruled, because possibly the court might think proper to relieve them at the hearing; but if the demurrer should be allowed they would be out of court, and so lose even the relief against their trustee, which they were plainly entitled to.

THE LORD CHANCELLOR. At this rate all policies of insurance would be tried in this court, for they are generally taken in the name of a trustee, and are made on ships going abroad, and the witnesses live abroad. Let the demurrer be respited till the defendant D'Goniegh has put in his answer; and on the 21st of November, 1729, the demurrer was allowed.¹

¹ Affirmed in 4 Bro. P. C. (Toml. ed.) 436; Fall v. Chambers, Mosely, 193; Motteux v. London Assurance Co., 1 Atk. 545, 547; Cator v. Burke, 1 Bro. C. C. 434; Keys v. Williams, 3 Y. & C. Ex. 462; Rose v. Clarke, 1 Y. & C. C. C. 534, 548; Clark v. Cort, Cr. & Ph. 154, 159 (*semble*); Rawson v. Samuel, Cr. & Ph. 161, 178; Hammond v. Messenger, 9 Sim. 327; Bolton v. Powell, 14 Beav. 275; Hoskins v. Holland, 44 L. J. Ch. 273; Doggett v. Hart, 5 Fla. 215; Adair v. Winchester, 7 Gill & J. 114; Walker v. Brooks, 125 Mass. 241; Carter v. United Ins. Co., 1 Johns. Ch. 463; Ontario Bank v. Mumford, 2 Barb. Ch. 596, 615 (*semble*); Western Co. v. Nolan, 48 N. Y. 513; Smiley v. Bell, Mart. & Y. 378; Moseley v. Boush, 4 Rand. 392, *accord*.

Townsend v. Carpenter, 11 Ohio, 21, *contra*.

In Hammond v. Messenger, *supra*, Sir L. Shadwell, V. C., said, p. 332: "If this case were stripped of all special circumstances, it would be simply a bill filed by a plaintiff who had obtained from certain persons to whom a debt was due a right to sue in their names for the debt. It is quite new to me that, in such a simple case as that, this court allows, in the first instance, a bill to be filed, against the debtor, by the person who has become the assignee of the debt. I admit that, if special circumstances are stated, and it is represented that, notwithstanding the right which the party has obtained to sue in the name of the creditor, the creditor will interfere and prevent the exercise of that right, this court will interpose for the purpose of preventing that species

DOE, ON THE DEMISE OF BRISTOW, v. PEGGE.

IN THE KING'S BENCH, EASTER TERM, 1785.

[Reported in 1 Term Reports, 758, note (a).]

EJECTMENT was brought for a moiety of the manor of Winkburne, &c., under the will of D. Burnell, as one of his co-heirs. By the testator's marriage settlement in 1748 two terms in trust were created: one for ninety-nine years, to secure an annuity of £200 to his mother; the other for one thousand years, for raising £3,000 for his wife, in case she should have no issue; the money to be raised out of the rents and profits, or by sale or mortgage. The testator died in 1774, having no issue, and devised all his estates to trustees and their heirs, to the use of them and their heirs in trust, after the death of his widow, who was entitled to a life-estate under the marriage settlement, for such person or persons as according to the laws of descent should be his heirs-at-law, and the heirs of their bodies, to take as tenants in common, &c., if more than one. The defendant filed a bill in chancery in 1776 against all persons who were supposed to have any claim as heirs-at-law, and against the trustees, and an issue was directed under which he was found heir-at-law by descent from a daughter of a common ancestor. The lessor of the plaintiff also had filed a bill in 1783, his claim having never been known before; but upon the death of the widow he brought this ejectment, and proved his pedigree from another daughter of the same common ancestor. At the trial the defendant set up these terms; the testator's mother being still living, and her annuity regularly paid by the receiver appointed by the Court of Chancery; the £3,000 having likewise been raised for his widow, and the term assigned in mortgage.

Mr. Justice Heath, who tried the cause at the last assizes at Nottingham, nonsuited the plaintiff, with leave to move to set aside the

of wrong being done; and, if the creditor will not allow the matter to be tried at law in his name, this court has a jurisdiction, in the first instance, to compel the debtor to pay the debt to the plaintiff; especially in a case where the act done by the creditor is done in collusion with the debtor." See also *Lenox v. Roberts*, 2 Wheat. 373.

Although legal proceedings to enforce payment of a chose in action should be instituted by the assignor and not by the assignee, a payment without legal process should be made to the assignee; for, the assignment being an authority to the assignee to receive payment, the payment, in fact, to him is a payment in law to the assignor. If, indeed, the obligor having notice of the assignment, should make the payment to the assignor, the obligation would necessarily be discharged at law, but the obligor would still be liable in equity for the amount of the claim to the assignee. *Roberts v. Lloyd*, 2 Beav. 376. If both the assignor and the assignee demand payment of the obligor, the latter should file a bill of interpleader against them. *Jones v. Farrell*, 1 De G. & J. 208. See — *v. Walford*, 4 Russ. 372. — Ed.

nonsuit, and enter a verdict for the plaintiff, if the court should be of opinion that he was entitled to recover.

Upon the motion, it was stated that the receiver had been appointed by the Court of Chancery during the life of the widow, and for such premises only as her life-estate did not extend to; and that the lessor of the plaintiff did not desire to disturb the terms, but was ready to partake of the charge.

Wilson, Dayrell, and Brough, for the plaintiff. As these parties claim from the same common ancestor, under one and the same title, one of them ought not to be permitted to set up these terms against the title of the other, since he himself is permitted to show his title, subject to the same incumbrances. Such an objection ought on no account to prevail as between these parties; and the possession of one tenant in common is the possession of both.

The annuity not being in arrear, the trustees of the term of ninety-nine years themselves could not recover possession. Besides, a trust estate should never be set up against the *cestui que trust*. And as to the remainder after the terms are satisfied, there is a resulting trust, and the termors are trustees for the heir-at-law. Nay, till default of payment of interest, or the money raised, the terms are in trust for the heir-at-law. An ejectment is in the nature of a feigned issue, and merely intended to try the real title. In the case of *Lade v. Holford and Another*,¹ Lord Mansfield declared that he and many of the judges had resolved never to suffer a plaintiff in ejectment to be nonsuited by a term standing out in his own trustee, or a satisfied term to be set up by a mortgagor against his mortgagee, but to direct the jury to presume it surrendered.

So in the case of *White, ex dem. Whatley, v. Hawkins*, M. 14 Geo. III.,² it was held that a mortgagee need not give notice to a tenant to quit before ejectment brought, if he mean only to get into the receipt of the rents and profits, and not to dispute the title of the tenant. *Moss v. Gallimore*.³ In this instance, the lessor of the plaintiff is willing to admit the charge of these terms, and take subject to them.

Balguy and Gally, contra. If a tenant in common hold adversely, an ejectment will lie; but the defendant does not hold adversely, and the terms set up are no part of the title of either party, but paramount to both. The purposes for which they were created have arisen, and are subsisting. If an ejectment were such an issue as is contended, the doctrine of terms would be extinguished, and all differences by reason of such being outstanding at an end. The rule is, that a plaintiff in ejectment must recover by the strength of his own title, Bull. Nisi Prius, 208; and must show a right of possession, 1 Burr. 119. These terms being unsatisfied, the plaintiff is not entitled to the possession. It is

¹ Bull. Nisi Prius, 110.

² Bull. Nisi Prius, 96, and Dougl. 23, n. 7.

³ Dougl. 265.

true that a satisfied term cannot be set up. Dougl. 695. But the only cases where unsatisfied terms cannot be set up are against *cestui que trust*, in a clear case, or against those under whom the defendant claims. But if the trust be doubtful, the court will leave the party applying to his remedy in equity.

They also cited a case before Ashhurst, Justice, at Leicester summer assizes, 1784, *White, ex dem. Henson, v. Beaumont*, which was an ejectment brought by a devisee against the heir-at-law, who produced a mortgage term, on which the plaintiff was nonsuited, that being deemed a complete bar.

LORD MANSFIELD, C. J. An ejectment is a fictitious remedy to try the title to the possession of lands; it is of infinite consequence that it should be adapted to attain the ends of justice, and not entangled in the nets of form. Great difficulties have arisen as to the legal form of passing land, from the modes of conveyancing in England since the Statute of Uses. Trusts are a mode of conveyance peculiar to this country. In all other countries, the person entitled has the right and possession in himself. But in England estates are vested in trustees, on whose death it becomes difficult to find out their representatives; and the owner cannot get a complete title. If it were necessary to take assignments of satisfied terms, terrible inconveniencies would ensue from the representatives of the trustees not being to be found. Sir E. Northey's clerk was trustee of near half of the great estates in the kingdom; on his death it was not known who was his heir or representative. So that where a trust term is a mere matter of form, and the deeds were muniments of another's estate, it shall not be set up against the real owner. It is therefore settled that a satisfied trust shall be taken to be a trust for the benefit of the heir-at-law. A trust shall never be set up against him for whom the trust was intended. It is a mere form of conveyance. And it is admitted that, where the term is in trust for the benefit of the lessor of the plaintiff, the defendant shall not set it up in ejectment as a bar to his recovery.

To go a step further: third persons may have titles, and therefore the court say, that where there is a tenant in possession under a lease, which is a bar to the recovery of the lessor, he being to recover by the strength of his own title, yet to prevent this from being turned improperly against the person entitled to the inheritance, whose right is not disputed by the tenant, if the lessor dispute the property only against another, and give notice to the tenant that he does not mean to disturb his tenancy, the court will never suffer the tenant to set up the lease as a bar to the recovery.

There is another distinction to be taken, whether, supposing a title superior to that of the lessor of the plaintiff exists in a third person, who might recover the possession against him, it lies in the mouth of a

defendant to say so in answer to an ejectment brought against himself by a party having a better title than his own. I found this point settled before I came into this court, that the court never suffers a mortgagor to set up the title of a third person against his mortgagee. For he made the mortgage, and it does not lie in his mouth to say so, though such third person might have a right to recover possession. Nor shall a tenant who has paid rent, and acted as such, ever set up a superior title of a third person against his lessor, in bar of an ejectment brought by him; for the tenant derives his title from him. Laying down these principles, let us now see the application of them to this case. There are disputes between the plaintiff and the defendant, who are co-heirs; as such, the plaintiff claims half of the property, and wishes to be admitted into possession of the premises with the defendant. He proves his descent. Then what is the defence set up? A trust for a third person, an annuity, is set up. The plaintiff admits the charge, and says that he only claims subject to the incumbrances. The trustees do not assert their title. Then shall others be admitted to set it up? It is clear that the other co-heirs shall not be permitted to dispute the title with him. He and the defendant have an equitable title as tenants in common, and the plaintiff must recover a moiety.

WILLES, J., concurred.

ASHHURST, J. In such a case as this a legal bar shall never be set up in ejectment against the justice of the case. The trustees may perform their functions as well, after both the parties are in possession. The old doctrine is relaxed in many instances.

BULLER, J. I entirely agree with my Lord. An objection has been taken at the bar, that the plaintiff in ejectment must recover by the strength of his own title: the old cases certainly say so; but for the last forty or fifty years constant exceptions to this rule have been admitted. One case which is received as clear law, and is an exception to it, is that of a tenant who cannot set up the title of the mortgagee against the mortgagor; because he holds under the mortgagor, and has admitted his title.

There was a case before me at Guildhall, and I believe another upon the Oxford circuit, of the same nature, where a lessee for years had got possession of some mortgage deeds, and endeavored to set up that title against the mortgagor; but though this showed that the plaintiff had no right to recover as against the mortgagee, yet I permitted him to do so in that instance; and the decision was acquiesced under.

It is not therefore true that an outstanding unsatisfied term is always an answer to a plaintiff in ejectment. So long ago as the time of Justice Gundry, when an outstanding satisfied term was offered by a defendant ejectment as a bar to the plaintiff's recovery, that judge refused to admit it, saying, that there was no use in taking an outstanding

term, but for the sake of the conveyancers' pockets: since which time it has been the uniform doctrine, that if the plaintiff be entitled to the beneficial interest he shall recover the possession. The next objection is, that this is a reversionary interest; but that is not material; for it has been further ruled of late years that a lessor of a plaintiff may recover in an ejectment a reversionary interest, subject to a lease and right of present possession existing in another.

The annuitant is only entitled to her £200 per annum, and not to the possession itself whilst there is no default; indeed, she does not require it. But the heir-at-law is entitled to the possession subject to that charge. The annuitant, however, is in a different situation from the mortgagee; for the latter is entitled to receive the whole in diminution of the principal and interest.

So that the plaintiff must have a general judgment for that part which is not in the possession of the receiver; and as to that which is, he must enter into a rule not to disturb that possession; submitting to the mortgage and the annuity.

*Rule absolute.*¹

¹ *Lade v. Holford*, Bull. N. P. 110 *a*; *Armstrong v. Peirse*, 3 Burr. 1901 (*semble*); *Doe v. Pott*, Doug. 721 (*semble*); *Goodright v. Wells*, Doug. 777 (*semble*); *Goodtitle v. Knot*, Cowp. 43, 46 (*semble*), *accord*.

In *Goodtitle v. Jones*, 7 T. R. 45, it is reported that "Lord Kenyon observed, that on this special verdict the question between the two litigating parties was not open to discussion; for that it was stated in the verdict that an old term, which was created in the last century, had been from time to time assigned, and was noticed as a subsisting term so lately as in the year 1780, in the mortgage by Owen Jones to Derbyshire. That as long as that was in existence, it was an answer to an ejectment brought by any other person. That though under certain circumstances a judge might direct a jury to presume an outstanding satisfied term to have been surrendered by the trustee, yet if no such presumption were made, but it was stated as a fact that the term still continued, such a legal estate in the trustee must prevail in a court of law. That what was said by Lord Mansfield in *Lade v. Holford*, Bull. N. P. 110, 'that he would not suffer a plaintiff in ejectment to be nonsuited by a term standing out in his own trustee, or a satisfied term set up by a mortgagor against a mortgagee, but direct a jury to presume it surrendered,' must be understood with this restriction, that in either case the jury might presume the term surrendered, but that without such surrender the estate in the trustee must prevail at law, and that to the proposition so qualified he fully assented."

See also, to the same effect, *Hodsden v. Staples*, 2 T. R. 684; *Doe v. Sybourn*, 7 T. R. 2; *Barnes v. Crow*, 4 Bro. C. C. 10, 11; *Fenn v. Holme*, 21 How. 481; *Hooper v. Scheimer*, 23 How. 235; *Smith v. McCann*, 24 How. 398, 403; *Vallette v. Bennett*, 69 Ill. 632; *Kirkland v. Cox*, 94 Ill. 400; *Stearns v. Palmer*, 10 Met. 32, 35; *Raymond v. Holden*, 2 Cush. 264; *Davis v. Charles River Co.*, 11 Cush. 506; *Chapin v. First Society*, 8 Gray, 580; *First Society v. Hazen*, 100 Mass. 322; *Thompson v. Wheatley*, 13 Miss. 506; *Wolfe v. Dowell*, 21 Miss. 108; *Heard v. Baird*, 40 Miss. 793; *Den v. Bordine*, Spencer, 394; *Wright v. Douglass*, 3 Barb. 554; *Matthews v. McPherson*, 65 N. Ca. 189.

In Pennsylvania a *cestui que trust* may maintain an action at law. *Kennedy v. Fury*, 1 Dall. 72; *Presbyterian Congregation v. Johnston*, 1 Watts & S. 9, 56; *School Directors v. Dunkleberger*, 6 Barr, 29; *Tritt v. Crotzer*, 13 Pa. 451, 457.

Mr. Lewin, referring to the principal case, says: "The doctrines advanced by Lord

WEAKLY, ON THE DEMISE OF YEA, BART., v. ROGERS.

IN THE EXCHEQUER CHAMBER, MICHAELMAS TERM, 1789.

[Reported in 5 East, 138, note (a).]

SIR WILLIAM YEA had agreed, about seven years before, with the defendant to grant him, in consideration of a certain sum which was paid, a lease for his own and his son's life; and the defendant, on the faith of that agreement, had entered into possession and built a house on the premises. After which Sir William (not having executed any lease) gave the defendant six months' notice to quit, considering him as tenant from year to year, and brought this ejectment. The case was argued in this court in Trinity Term, 29 Geo. III.; when the court, after taking time to consider, and (as it was understood) not being agreed in opinion, directed the case to be argued before all the judges in the Exchequer Chamber; which argument took place in Michaelmas Term, 30 Geo. III., when a second argument was awarded, but the case was never brought before the judges again. [*Vide* 7 Term Rep. 51.] But, as I collected at the time, Lord Loughborough, C. J., Gould, Ashhurst, and Buller, JJ., were of opinion that the defendant's equitable title might be set up as a defence to the ejectment. Lord Kenyon, C. J., Eyre, C. B., and Heath, J., were decidedly of a different opinion: and with these it is probable that the other judges coincided; though I have no authority for saying so; and no public opinion was ultimately delivered on the case. But that an equitable title cannot be set up in ejectment has ever since been considered as settled.¹

Mansfield in the last century were long ago overruled. . . . 'Lord Mansfield,' as Lord Redesdale observed [*Shannon v. Bradstreet*, 1 Sch. & Lef. 66], 'had on his mind prejudices derived from his familiarity with the Scotch law, where law and equity are administered in the same courts.' " Lewin, *Trusts* (7th ed.), 579.

A *cestui que trust* who has demised premises to another may maintain an action at law upon the covenants in the lease, the lessee not being allowed to dispute the landlord's title. *Blake v. Foster*, 8 T. R. 487. — ED.

¹ *Roe v. Lowe*, 1 H. Bl. 446; *Doe v. Wharton*, 8 T. R. 2; *Roe v. Reade*, 8 T. R. 122; *Doe v. Wroot*, 5 East, 132; *Doe v. Phillips*, 10 Q. B. 130 (*semble*); *Neave v. Avery*, 16 C. B. 328; *Drake v. Pywell*, 4 H. & C. 78 (*semble*); *Allen v. Walker*, L. R. 5 Ex. 187; *Watkins v. Holman*, 16 Pet. 25; *U. S. v. King*, 7 How. 833, 847; *Greer v. Mezas*, 24 How. 268, 275; *Gunn v. Barrow*, 17 Ala. 743; *Reece v. Allen*, 10 Ill. 236, 241 (*semble*); *Wales v. Bogue*, 31 Ill. 464; *Page v. Cole*, 6 Iowa, 153; *Stinebaugh v. Wisdom*, 13 B. Mon. 467; *Matthews v. Ward*, 10 Gill & J. 443; *Crane v. Crane*, 4 Gray, 323; *Fitzpatrick v. Fitzgerald*, 13 Gray, 400; *Essex Co. v. Durant*, 14 Gray, 447; *Phelps v. Townsley*, 10 All. 554; *Moody v. Farr*, 33 Miss. 192; *Jackson v. Chase*, 2 Johns. 84; *Jackson v. Pierce*, 2 Johns. 221; *Jackson v. De Yo*, 3 Johns. 422; *Jackson v. Van Slyck*, 8 Johns. 487; *Sinclair v. Jackson*, 8 Cow. 543; *Moore v. Spellman*, 5 Den. 225 (overruling *Jackson v. Bateman*, 2 Wend. 570; *Jackson v. Leggett*, 7 Wend. 377); *Den v.*

ALLEN, ASSIGNEE OF PRIOR, A BANKRUPT, v. IMPETT
AND ANOTHER.

IN THE COMMON PLEAS, APRIL 29, 1818.

[Reported in 8 Taunton, 263.]

ASSUMPSIT for money had and received. At the trial, before Dallas, J., at the London sittings after the last term, it appeared that the defendants were trustees of the marriage settlement of the bankrupt, and that certain stock thereby settled was held by them, upon trust, to pay the dividends to the bankrupt during his life; that he had been permitted by the defendants to receive these dividends, until the issuing of the commission against him, which happened in December, 1815; that in August, 1816, the defendants executed a power of attorney to a third party to receive the dividends, who, accordingly, received two half-years' dividends, due in April and October, 1816, and paid them over to the wife of the bankrupt, and also received another half-year's dividend, due in April, 1817, which he paid over to one of the defendants. The present action was brought to recover the total amount of these dividends. Dallas, J., being of opinion that the defendants were liable in equity only, and that the action was not maintainable, directed a nonsuit.¹

Copley, Serjt., had obtained a rule *nisi* in the last term to set aside the nonsuit and enter a verdict for the plaintiff for the whole sum sought to be recovered. He cited *Moses v. Macferlan*.²

Blosset, Serjt., now showed cause, and contended that the action could not be maintained, as the plaintiff had no legal right to the money, but had merely an equitable interest; and that, at all events, as the obligation arose from a deed, such deed should have been declared upon. In support of the first objection he cited *Co. Litt. 272 b*,

Troutman, 7 Ired. 155; *Moore v. Burnet*, 11 Ohio, 334; *Beach v. Beach*, 14 Vt. 28; *Taylor v. King*, 6 Munf. 358; *Hopkins v. Stephens*, 2 Rand. 422, *accord*.

Warren v. Ireland, 29 Me. 62; *Sawyer v. Skowhegan*, 57 Me. 500; *French v. Patterson*, 61 Me. 203; *Blake v. Collins*, 69 Me. 156 (conf. *Cary v. Whitney*, 48 Me. 516); *Brown v. Weast*, 8 Miss. 181; *Heard v. Baird*, 40 Miss. 793, 799 (*semble*); *Scoby v. Blanchard*, 3 N. H. 170, *contra*.

In *Doe v. Wroot*, *supra*, Lord Ellenborough, C. J., said, p. 138: "We can only look to the legal estate, and that is clearly not in the devisees, but in the heir-at-law of the surrendoror; and if the devisees have an equitable interest, they must claim it elsewhere, and not in a court of law. For as to the doctrine that the legal estate cannot be set up at law by a trustee against his *cestui que trust*, that has been long repudiated, ever since a case which was argued in the Exchequer Chamber some years ago." — *Ed*.

¹ See Holt N. P. 641. — *Ed*.

² 2 Burr. 1005; s. c. 1 W. Bl. 219.

Chudleigh's Case,¹ Foorde v. Hoskins,² and, in support of the second, Atty v. Parish.³

Copley, Serjt., in support of the rule, contended that, as the trustees had given an authority to receive the dividends, under which they were actually received, there was nothing in the objections which had been urged to affect the plaintiff's right to recover.

*Per Curiam.*⁴ This action is brought to recover the amount of dividends of stock to which the bankrupt was entitled, and which his trustees have received since the bankruptcy, and applied to various purposes. With full notice of the bankruptcy, they refuse to pay the money over to the assignees. There cannot be any difficulty in sustaining this action, the whole of the money having been virtually received by the trustees. *Rule absolute.*⁵

VANDERSTEGEN AND ANOTHER v. WITHAM.

IN THE EXCHEQUER, EASTER TERM, 1840.

[Reported in 6 Meeson & Welsby, 457.]

W. H. WATSON applied for a rule to show cause why the proceedings in this action should not be stayed, in order to enable the defendant to apply for an injunction to restrain the plaintiffs from proceeding in the action. It appeared from the affidavits that the defendant was the attorney of a Mrs. Vaughan, and had been authorized by her to receive certain rents and money for her; but that the plaintiffs, who were her trustees, had countermanded his authority, and brought this action to recover the money which he had so received. A bill in equity had been filed by the defendant against the plaintiffs, to obtain the injunction; and the affidavits stated that he was advised and believed he had sufficient grounds for obtaining it, but that, by the practice of the court, it could not be obtained until the lapse of about sixteen days. Watson

¹ 1 Rep. 121 b.

² 2 Bulst. 336.

³ 1 N. R. 104.

⁴ Gibbs, C. J., was absent.

⁵ See to the same effect Case v. Roberts, Holt N. P. 500 (*semble*); Hart v. Minor, 2 Cr. & M. 700; Roper v. Holland, 3 A. & E. 99; Sloper v. Cottrell, 2 Jur. N. S. 1046; Topham v. Morecraft, 8 E. & B. 972, — in which cases it was held that the relation of trustee and *cestui que trust* between the defendant and plaintiff had been determined as to the subject-matter of the action. The principle upon which the action at law was maintainable in the cases above cited was well expressed by Wightman, J., in Topham v. Morecraft, *supra*, p. 983: "It seems to me impossible to maintain that if a trustee, in possession of trust money, enter into an account with his *cestui que trust*, and thereupon expressly state an account, and acknowledge that he has a fund in hand applicable to the claim made on him, he does not thereupon put an end to his character of being a trustee merely, and become liable as a debtor to an action at law brought against him in his personal capacity." — ED.

referred to, and relied upon, a note at the conclusion of the case of *Best v. Thorowgood*,¹ which is as follows: "A stay of the *postea* was afterwards obtained, until answer put in by the plaintiff to a bill in equity filed against him by the defendant."

PARKE, B. It is impossible for us to interfere, and to stop the plaintiffs from proceeding in their action, which, upon the facts stated, they are entitled to bring. If the defendant has any equity, he must apply to the proper court to restrain the plaintiff from proceeding with the suit. As to the authority cited from the case of *Best v. Thorowgood*, the note is very short, and it does not appear upon what ground the rule was granted in that case; nor am I satisfied that the decision of the court there was correct, or consider it to be a sufficient authority for us to interfere and stop the plaintiffs' proceedings, when we do not know what answer they may give to the bill which has been filed against them, and it may turn out that the defendant has no equity at all.

ALDERSON, B. It seems to me that we ought not to grant this application. It is, in effect, calling upon this court to grant an injunction now, on the chance that some other court will grant one at some future period. If we have power to stay the proceedings for sixteen days, there is no reason why we should not stay them for a longer period, and grant a perpetual injunction. If it be thought expedient that the courts of law should have the power of granting injunctions, the legislature may, if they think proper, confer such a power; but at present they have none.

GURNEY, B., and ROLFE, B., concurred.

Rule refused.

BARTLETT v. MARY DIMOND, EXECUTRIX OF CHARLES
PALMER DIMOND, DECEASED.

IN THE EXCHEQUER, APRIL 17, 1845.

[*Reported in 14 Meeson & Welsby, 49.*]

The judgment² of the court was now delivered by

POLLOCK, C. B. This case was argued last term, and time taken for consideration. The question is, whether an action will lie against the defendant as executor, for money had and received by his testator. The testator was appointed by deed by the plaintiff, a mortgagor, and Palmer, the mortgagee, to receive the rents of the mortgaged estate, and by the terms of the deed the testator was, after allowing for the taxes and repairs to the tenants, to hold all the remaining rents in trust for the

¹ 4 Tyrw. 264; s. c. *nom.* *Best v. Argles*, 2 C. & M. 394. See 3 Dowl. P. C. 701.

² See *supra*, p. 79, n. 1. — ED.

purposes in the deed specified. The purposes are — first, to pay taxes ; secondly, the costs of collection ; thirdly, a commission ; fourthly, premiums on a policy of assurance ; and, lastly, to apply the surplus in or towards satisfaction, on the 6th January and 6th July, of the accruing interest on the principal money secured, and to pay the ultimate surplus, if any, to the plaintiff, with a proviso, that if on those days, the 6th January and 6th July, the testator should have rents and profits in hand, it should be lawful for him to retain the whole or part, for the purpose of paying the premiums in that year on the policy ; with other provisos. The deed contained a covenant by the testator with Palmer and with the plaintiff, that the testator, as long as he should be receiver, would use his endeavors to collect and receive, and would pay and cause to be paid, in manner and for the ends, intents, and purposes aforesaid, all the rents received by him. The testator did not execute the deed. According to the terms of this indenture, the defendant was bound, as Mr. Martin argued, to pay whatever was the balance on each 6th January and 6th July, first, in satisfying the interest, and, secondly, to pay over the then surplus to the plaintiff ; and as the account stated by the executor showed a balance on some of those days, an action would have lain, not of covenant, because the defendant did not execute the deed, but of special assumpsit (because he agreed to the instrument), on the special contract to make the payments ; and, as nothing more was to be done but to pay money, an action for money had and received could be maintained.

Whether, if this had been the true construction of the deed, such an action would have been supported, is not now the question, because we are all clearly of opinion that the testator was not bound, by the terms of the deed, to pay the surplus existing on each 6th January and 6th July to the plaintiff. Although there is a contract by the testator to receive and pay the moneys according to the deed, yet it is nothing more in effect than a contract to perform the trusts specified by the indenture, and all the moneys received by him under the indenture were held in trust. The testator was not a mere receiver, but a trustee, and the primary important object of his trust was to keep down the mortgage interest ; and for that purpose he had a discretion, under the control of a court of equity, to keep the funds in his hands, if reasonably necessary, and was not bound, on each 6th January and 6th July, to balance his accounts, and pay over on those days the then surplus. For instance, it might happen that, on the 6th July, the trustee might know that no rents would be forthcoming in time to pay the half-year's interest due in January ; and, if so, he might, without contravening the deed, keep the then surplus towards the subsequent interest. Whether he did so properly or not could not be tried by a court of law : the only remedy would be in a court of equity, which could make proper inquiries and

give proper directions. So long as a trust continues, a bill in equity is the only remedy. We think that the moneys received were originally received in trust, and that the trust had not determined at the testator's death. If that trust was ended, and the testator had stated an account, or, in other words, had admitted himself to the plaintiff that he held any sum of money in his hands payable to him absolutely, he would, with respect to that sum, be a debtor, not properly a trustee, and then an action would have been maintainable against him. This is the principle upon which *Roper v. Holland*,¹ and other cases² referred to in the judgment of this court in the case of *Pardoe v. Price*,³ was decided. The case of *Allen v. Impett* seems at least questionable.

There is no evidence, however, of any such statement of account. If the account rendered by the executor had been rendered by the testator, it would have been a question for the jury whether it was such a statement as to constitute the testator a debtor; but being stated by the executor as the account of the testator, it is only equivalent to evidence that such payments as therein mentioned were made by and to the testator. We therefore think the rule must be discharged.

*Rule discharged.*⁴

¹ 3 Ad. & Ell. 99; 4 Nev. & M. 668.

² See *Remon v. Hayward*, 2 Ad. & Ell. 666.

³ 13 M. & W. 282.

⁴ *Deeks v. Strutt*, 5 T. R. 690; *Jones v. Tanner*, 7 B. & C. 542; *Pardoe v. Price*, 16 M. & W. 451; *Edwards v. Lowndes*, 1 E. & B. 81, *accord*.

In *Edwards v. Lowndes*, *supra*, Lord Campbell said, p. 89: "It may be taken as settled that where the parties stand to each other in the relation of trustee and *cestui que trust*, and the trustee is under no other legal liability than that which arises from that relation, no action at law for money had and received can be maintained against him, though he has money in his hands which under the terms of the trust he ought to pay over to the *cestui que trust*, but which he still holds in the character of trustee only. It is unnecessary to refer upon this proposition to other authorities than that of the well-considered judgment delivered by Baron Rolfe in *Pardoe v. Price*, 16 M. & W. 451. If, indeed, the trustee, by appropriating a sum as payable to the *cestui que trust*, or otherwise, admits that he holds it to be paid to the *cestui que trust*, and for his use, the character of the relation between the parties is changed; and the trustee does not hold it as a trustee properly so called, but as a receiver for the plaintiff's use, who may maintain an action at law for money had and received, founded upon the appropriation to his use and the liability thence arising. There are many cases that are founded upon this principle, from *Allen v. Impett* to *Roper v. Holland*, 3 A. & E. 99; and these have reference to earlier decisions." — ED.

SECTION II.

The Right of a Cestui que Trust to compel a Conveyance of the Trust Property either to Himself or another Person.

SAUNDERS v. NEVIL.

IN CHANCERY, BEFORE SIR JOHN TREVOR, M. R., JANUARY 24, 1701.

[*Reported in 2 Vernon (Raithby's Edition), 423.*]

A TRUST being limited to the plaintiff and the heirs of his body,¹ with remainders over; the bill was to have the trustees convey to him in fee.²

THE MASTER OF THE ROLLS decreed them to convey an estate tail only, and refused to decree a conveyance in fee; and the case of Mr. Cooke and Woodward was cited, where the Lord Jefferies did refuse to decree a conveyance in fee, the remainder after an estate tail being limited to a charity.³

HEAD v. LORD TEYNHAM.

IN CHANCERY, BEFORE LORD LOUGHBOROUGH, SIR W. H. ASHHURST, J.,
AND SIR BEAUMONT HOTHAM, B., COMMISSIONERS, DECEMBER, 1783.

[*Reported in 1 Cox, 57.*]

BILL to carry the trusts of a will into execution, whereby, amongst other things, lands were limited to trustees for a term of five hundred years to raise £4,000 for younger children's portions. There being six

¹ And in default of heirs of the plaintiff's body, or according to the answer, if he should die without heirs of his body, then remainder over; the rents and profits to be applied in his maintenance till twenty-four, and the surplus, if any, to be paid to him. R. L.

² This is not correct; the bill was for a conveyance to plaintiffs and the heirs of his body, he having attained twenty-four, and had two children in marriage, and the defendants insisted that the will being so worded it was the intention of the testatrix that the plaintiff should not have the legal estate, nor be enabled to dock the entail; but that the premises should be preserved for the heirs of the body of the plaintiff, if he should leave any at his death, or in default thereof for the persons in remainder; and the decree was, that the defendants, the trustees, should execute a conveyance of the estate in question to the plaintiff and the heirs of his body. Reg. Lib. 1701, B, fol. 163.

³ *Payne v. Barker*, Sir O. Bridgman, 24 (*semble*), accord. — ED.

younger children entitled under this limitation to have the £4,000, two of them assigned their shares of the £4,000 to a trustee for the benefit of two other of the children. And the only question was, whether it was necessary that this trustee should be a party to this suit. For plaintiff it was insisted that as the original trustees of the term who had the legal estate, and all the children who had the beneficial interest, were before the court, there was no occasion to make the other trustee a party, and the court would direct a sale of the term without his joining in the sale; and of that opinion was the court, and decreed accordingly.¹

GOODSON v. ELLISSON.

IN CHANCERY, BEFORE LORD ELDON, C., AUGUST, 1824; MARCH,
JULY, DECEMBER, 1826; APRIL 21, 1827.

[*Reported in 3 Russell, 583.*]

ELDON (LORD CHANCELLOR).² In 1767 a deed was executed, and I will assume that a fine was properly levied in pursuance of it, by which an estate was granted and conveyed to Richard Ellisson and his heirs on certain trusts. The bill deduces the various changes of the title to the equitable interest, which occurred between 1767, and November, 1822, bringing it, in 1819, into eight different persons, each of whom is represented as the owner of an undivided eighth part of the property. These eight persons sell the property in different lots to different persons; and, the present plaintiff having bought one of the lots, a deed is prepared, conveying certain parcels of land to him; that deed the eight persons who are represented as the owners of the beneficial interest, have executed; and the co-heiresses of Richard Ellisson are also required to execute it. They refuse, and the bill is filed.

By the answer they first state that Richard Ellisson never accepted the trust, and they refer to transactions of some importance with respect to the property, in the interval between 1767 and the filing of the bill, to which neither they nor any of the persons whom they represent were called upon to be parties, though some of the persons interested in the property at those times were conversant with the law. From these circumstances, they come to the conclusion that the trust was never accepted; and towards the close of the answer they intimate that they themselves have a beneficial interest in the estate. How they make out that such an interest is in them they do not explain, and there

¹ Conf. *Wood v. Williams*, 4 Mad. 186; *Cope v. Parry*, 2 J. & W. 538. — Ed.

² See *supra*, p. 79, n. 1. — Ed.

is not the slightest color of pretext for supposing that they have a single particle of beneficial interest.

The Master of the Rolls has ordered the defendants to execute the conveyance, and to pay the costs of the suit.

Now, even if the plaintiff had been the purchaser of the whole estate, and the conveyance had related to the whole, it would have been a matter for consideration, whether the trustees would not have a right, where there has been so much devolution of title, to have the title examined in this court, instead of being required to acquiesce in an opinion which was not clothed with the sanction of judicial authority. But this plaintiff is the purchaser of only sixteen acres of the property, and the rest of the estate has been sold to other persons in different lots! Now, I confess it is quite new to me to be informed that you can call on a trustee from time to time to divest himself of different parcels of the trust estate, so as to involve himself as a party to conveyances to twenty different persons. Has not a trustee a right to say, "If you mean to divest me of my trust, divest me of it altogether, and then make your conveyances as you think proper?" I have been accustomed to think that a trustee has a right to be delivered from his trusts, if the *cestuis que trust* call for a conveyance.

Another principle which has been lost sight of in this decree is, that a trustee can be called on to convey only by the words and descriptions by which the conveyance was made to him. In this respect he is like a mortgagee.

I see nothing in the record which would have hindered me from directing these ladies to convey, if I had such parties before me as would have enabled me to direct a conveyance of the whole estate. If the *cestuis que trust* had all been here, they might have prayed that the sixteen acres in question might be conveyed to Goodson, and the residue of the estate to a trustee on trust to convey to the other purchasers. As the suit is framed, I cannot take that course.

The following decree was made: "His Lordship doth order that the decree made in this cause, the 18th of August, 1824, be reversed; and it is ordered that it be referred to the Master to inquire and state to the court whether the plaintiff is entitled to that beneficial equitable estate which he seeks to have clothed with a legal estate by conveyance; and in making the said inquiry it is ordered that the Master do ascertain and state to the court whether all prior vested and contingent equitable titles have failed by deaths or non-existence of persons who would have taken before the plaintiff, &c. And it is ordered that the said Master do tax the costs of the defendants of this suit to this time, including their costs of the appeal, as between party and party, that the same, when taxed, be paid by the plaintiff to the defendants; but this taxation is to be without prejudice as to whether the defendants shall not be

finally entitled to any further costs, charges, and expenses; and his Lordship doth reserve the consideration of all further directions, and whether the defendants shall be allowed any further costs, charges, and expenses up to this time, and also the consideration of all subsequent costs, charges, and expenses, until after the Master shall have made his report."¹

WATTS v. TURNER.

IN CHANCERY, BEFORE SIR JOHN LEACH, M. R., JULY 6, 1830.

[Reported in 1 Russell & Mylne, 634.]

A TRUST estate descended to the defendant; and the plaintiff, who was *cestui que trust*, being entitled to the legal estate, a draft of the intended conveyance was sent to the solicitor of the defendant, and approved of by him. The defendant afterwards refused to execute the conveyance unless the plaintiff paid him a sum of money. The bill was filed to compel a conveyance.

Mr. Pemberton and *Mr. Ching*, for the plaintiff.

Mr. Wilbraham, for the defendant, the trustee, submitted, that as the plaintiff had chosen to file a bill, instead of applying for a conveyance in a summary way by petition under the statute, he had himself to blame for any trouble and expense he had incurred.

THE MASTER OF THE ROLLS made the decree against the defendant, with costs.²

SAUNDERS v. VAUTIER.

IN CHANCERY, BEFORE LORD LANGDALE, M. R., MAY 7, 1841.

[Reported in 4 Beavan, 115.]

THE testator, Richard Wright, by his will, "gave and bequeathed to his executors and trustees thereafter named all the East India stock

¹ See *Smith v. Snow*, 3 Mad. 10; *Thompson v. Galloupe*, 100 Mass. 435.

² In *Jones v. Lewis*, 1 Cox, 199; *Willis v. Hiscox*, 4 M. & Cr. 197; *Holford v. Phipps*, 3 Beav. 434; *Thorby v. Yeats*, 1 Y. & C. C. C. 438; *Campbell v. Home*, 1 Y. & C. C. C. 664; *Penfold v. Bouch*, 4 Hare, 271; *Firmin v. Pulham*, 2 De G. & Sm. 99; *Devey v. Thornton*, 9 Hare, 222, 232; *King v. King*, 1 De G. & J. 663; *Palairt v. Carew*, 32 Beav. 564, — the right of a *cestui que trust* to compel a conveyance of the legal estate by the trustee was fully recognized. — Ed.

which should be standing in his name at the time of his death, upon trust to accumulate the interest and dividends which should accrue due thereon, until Daniel Wright Vautier should attain his age of twenty-five years, and then to pay or transfer the principal of such East India stock, together with such accumulated interest and dividends, unto the said Daniel Wright Vautier, his executors, administrators, and assigns absolutely. And the testator devised and bequeathed his residuary real and personal estate to the persons in his will named.

The sum of £2,000 East India stock was standing in the testator's name at his death in 1832. A suit was afterwards instituted for the administration of the testator's estate; and Daniel Wright Vautier being an infant, a reference in the cause was made to the Master, to approve of a sum to be allowed for his maintenance. The Master reported his fortune to consist of the East India stock in question, and reported that £100 a year ought to be allowed for his maintenance out of the dividends thereof.

Sir C. C. Pepys, who was then Master of the Rolls, by an order dated the 25th of July, 1835, confirmed the report, and ordered the payment of £100 a year out of the dividends of the East India stock, for the maintenance of the infant, Daniel Wright Vautier.

Daniel Wright Vautier attained twenty-one in March, 1841, and presented a petition to have a transfer of the fund to him.

Mr. Pemberton argued that the petitioner had a vested interest, and that as the accumulation and postponement of payment was for his benefit alone, he might waive it and call for an immediate transfer of the fund. *Josselyn v. Josselyn*.¹

THE MASTER OF THE ROLLS. I think that principle has been repeatedly acted upon; and where a legacy is directed to accumulate for a certain period, or where the payment is postponed, the legatee, if he has an absolute indefeasible interest in the legacy, is not bound to wait until the expiration of that period, but may require payment the moment he is competent to give a valid discharge.

Mr. Kindersley, for the residuary legatees, most of whom are infants, was proceeding to argue that the petitioner did not take a vested interest until he attained twenty-five, but the Master of the Rolls observed that the contrary must have been decided or assumed when the order for maintenance had been made by the present Lord Chancellor. He did not at present see any reason to doubt the propriety of that order, but the argument must assume it to be erroneous, and call upon him to decide in a different manner, and he thought that it would be inconvenient to argue again in this court a point on which the judge of the court of rehearing had probably already expressed an opinion.

¹ 9 Sim. 63.

The cause stood over, with liberty to apply to the Lord Chancellor,¹ when the Lord Chancellor held the legacy vested, and ordered the transfer.²

BUTTANSHAW v. MARTIN.

IN CHANCERY, BEFORE SIR W. PAGE WOOD, V. C., MARCH 1, 2, 12, 1859.

[*Reported in Johnson*, 89.]

THOMAS TAYLOR died in 1820, having by his will in that year devised certain lands in the county of Kent, of which he was seised in fee, to Fry, Knowles, Martin, and Fry the younger, and their heirs, to the use of Fry, Knowles, Martin, and Fry the younger, their heirs and assigns, during the life of his daughter the plaintiff, Ann Buttanshaw (then Ann Edmeades, the wife of Robert Edmeades, since deceased), upon trust to pay the rents to her during her life, for her separate use, without power of anticipation, with remainder to the use of her children as tenants in common in tail; and if but one child, to the use of such only child in tail; with remainder to the use of the said Fry, Knowles, Martin, and Fry the younger, during the life of his daughter Elizabeth Golding, upon like trusts for her separate use during her life, with remainder to the use of her children as tenants in common in tail; and if but one child, to the use of such only child in tail; with remainder to the use of his wife for life, with remainder to the use of certain nephews and nieces of the testator as tenants in common in fee. The testator then by his will bequeathed to the same trustees the sum of £17,600 upon trust to invest in the purchase of freehold lands, to be conveyed to them and their heirs, as a further and collateral security for the payment of an annuity by his will bequeathed to his wife; and subject thereto to such uses, and upon such trusts, as were by his will limited and declared concerning the lands thereby devised as aforesaid. And he did thereby declare and direct that it should be lawful for the said Fry, Knowles, Martin, and Fry the younger, and the survivors, &c., from time to time during the lifetime of his daughter Ann, and the minority of her children, to grant leases of the said devised premises as therein mentioned. And he appointed the said trustees executors of his will.

The plaintiff Ann Buttanshaw survived her husband Robert Edmeades, and a second husband, Henry Buttanshaw, and was now a widow. She

¹ See 1 Cr. & Ph. 240.

² *Josselyn v. Josselyn*, 9 Sim. 63; *Jackson v. Marjoribanks*, 12 Sim. 93; *Curtis v. Lukin*, 5 Beav. 147, 155, 156 (*semble*); *Rocke v. Rocke*, 9 Beav. 66; *Magrath v. Morehead*, L. R. 12 Eq. 491; *Croxton v. May*, 9 Ch. D. 388 (*semble*), *accord*.

See *Sears v. Hardy*, 120 Mass 524 - Ed.

had one child, the plaintiff, Mary Ann, the wife of the plaintiff Thomas Poynder.

The bill was filed against the present trustees of the will, and it prayed to have the rights of the plaintiffs declared, and the trust premises remaining uninvested invested for their benefit, and for an account and a receiver.

It appeared that divers lands had been purchased with portions of the trust fund (£17,600), and had been settled as directed in the will.

It also appeared that, by an indenture made in 1842, between the plaintiff Mary Ann Poynder (then Mary Ann Edmeades) of the first part, the plaintiff Ann Buttanshaw (then the wife of the said Henry Buttanshaw) of the second part, and the said Henry Buttanshaw of the third part, and enrolled pursuant to the Act 3 & 4 Will. IV. c. 74, the said Mary Ann, "with the consent of the said Ann Buttanshaw as the protector of the settlement," purported to disentail all the aforesaid property, both real and personal, and to limit the same (subject to the said estate for the life of the said Ann Buttanshaw therein, and all powers and authorities appendant or appurtenant thereto) to the use of herself absolutely.

The testator's widow had long since been dead, and nothing was due in respect of her annuity.

Neither Elizabeth Golding nor any of her children were parties to the suit.

Upon the cause now coming on for further consideration, two questions arose, namely, first, whether the plaintiff Ann Buttanshaw was entitled to call upon the trustees for a conveyance of the legal estate in the lands subject to the trusts of the will; secondly, whether the plaintiffs were entitled to call upon the trustees to transfer to them, or as they should direct, the securities upon which the residue of the £17,600 was invested.

With reference to the first of these questions,

Mr. Giffard, Q. C., and *Mr. Dart*, for the plaintiffs, submitted that the plaintiff, Ann Buttanshaw, being now *discoverte* and *sui juris*, was entitled to call upon the trustees of the will for a conveyance of the legal estate, that estate being vested in them only during her life, and the purposes for which it was so vested in them (*viz.* the further security of the annuity, and the protection of her separate estate) being now accomplished. Trustees could not refuse compliance with the directions of the *cestui que trust*, who had obtained an absolute interest.

Mr. James, Q. C., and *Mr. F. S. Williams*, for the trustees of the daughter's settlement, supported the same contention.

Mr. Willcock, Q. C., and *Mr. W. D. Lewis*, for the trustees of the will, submitted that they ought not to be compelled to part with the legal estate in the premises. By the thirty-first section of the Fines and

Recoveries Abolition Act¹ they were the protectors of the settlement effected by the will, and as such, by the thirty-sixth section of the act, were exempt from all control and interference on the part of a court of equity, so far as regarded their power of consent; and any attempt to control them would be void.

THE VICE-CHANCELLOR. You are only trustees for this lady's life, and she says, Clothe my equitable interest with the legal estate.

Mr. Willcock. The trustees have no desire to occasion needless difficulties; they are only anxious to carry out the intention of the testator; and the testator has manifested an intention that they should continue to hold the legal estate during the whole of his daughter's lifetime.

THE VICE-CHANCELLOR. Would you apply the same argument if her interest had been in fee?

Mr. Willcock. It is only an estate for life, and there are ulterior limitations over which the act intended the trustees to protect. To neglect this would, in their view, be a breach of trust.

Mr. Giffard, Q. C., in reply. It is clear the trustees would commit no breach of trust by complying with the plaintiff's request, their sole duty being to protect her separate estate during coverture, which is at an end, and to secure an annuity which has expired. The powers of leasing are entirely distinct.

THE VICE-CHANCELLOR. There is money bequeathed to the trustees, and directed to be laid out in lands to be settled to the same uses.

Mr. Giffard. But only for the purpose of protecting the separate estate of the tenant for life; and if the tenant for life, being *discoverte* and *sui juris*, asks to have that circuitous and expensive course dispensed with, the court will not allow it to be pursued for no useful purpose. [Here the reply was stopped by the Vice-Chancellor.]

Judgment reserved.

VICE-CHANCELLOR SIR W. PAGE WOOD. I am satisfied that the plaintiff Mrs. Buttanshaw is entitled to a conveyance of the legal estate in the lands vested in the trustees during her life.

I have examined the act since yesterday, and it is clear to me that bare trustees, who, under the thirty-first section, are protectors of a settlement, can insist on retaining the legal estate only so long as the purposes of the trust exist; that is, so long as, according to the rules of this court, they are required to be trustees. The section was obviously intended to meet the case of a settlement where there are contingent remainders, which the trustees were intended to protect. Here there are no such contingent remainders. The legal estate vested in the trustees does not extend beyond the life of the tenant for life, or in any way affect the remainders over in tail, which are limitations of the legal estate.

¹ 3 & 4 Will. IV. c. 74.

The case is simply that of four trustees appointed by the testator to take care of his daughter's interest while under coverture, and without any other direction as to the legal estate vested in them for that purpose ; for I observe that the leasing powers are wholly independent of that estate. The lady is now *discoverte* and *sui juris*, and, being so, expresses her desire that her interest should not be incumbered by this expensive machinery of trustees any longer ; and it seems to me that she is entitled to have the legal estate in question conveyed to her.

The trustees must be ordered to convey the legal estate in all the lands to the plaintiff Ann Buttanshaw during her life.

The second question, namely, whether the plaintiffs were entitled to call for a transfer of the securities, stood over to be discussed, if necessary, when the minutes had been prepared ; and the cause now coming on to be spoken to upon the minutes, —

Mr. Willcock, Q. C., and *Mr. W. D. Lewis*, for the trustees, submitted that, by the thirty-fourth section of the act, the deed of 1842, having been executed by the plaintiff Mrs. Poynder, without the consent of the trustees as protectors of the settlement, was ineffectual to create more than a base fee ; and the persons entitled in remainder not being before the court, the trustees, if they transferred the securities, as required by the plaintiffs, would be liable to have a suit instituted against them by the absent parties.

THE VICE-CHANCELLOR (to *Mr. James*). I have great difficulty in ordering a transfer of the securities in the absence of the other parties interested.

Mr. James. The funds so secured are liable to be invested in land ; and, if so invested, it would follow from the decision upon the former point that the plaintiffs are entitled to a transfer.

THE VICE-CHANCELLOR. I think the proper course will be to make a declaration and order in this form : Declare that the plaintiff Ann Buttanshaw is entitled to all moneys and securities remaining subject to the trusts of the will, and to any land to be purchased therewith, for her life, free from any trust or interest in the defendants, the trustees. And upon a proper deed being executed by the plaintiffs, Ann Buttanshaw and Mary Ann Poynder, let all securities be transferred by the trustees according to the effect of the deed to be so executed. But no such transfer to be made until one month after service of this order upon the persons entitled in remainder. Liberty for the parties so served, and any other parties, to apply.

GOSLING v. GOSLING.

IN CHANCERY, BEFORE SIR W. PAGE WOOD, V. C., MARCH 1, 1859.

[*Reported in Johnson*, 265.]

VICE-CHANCELLOR SIR W. PAGE WOOD.¹ This case appears to me to be not only clear in principle, but almost covered by the authorities which were cited.

The principle of this court has always been to recognize the right of all persons who attain the age of twenty-one to enter upon the absolute use and enjoyment of the property given to them by a will, notwithstanding any directions by the testator to the effect that they are not to enjoy it until a later age, unless, during the interval, the property is given for the benefit of another. If the property is once theirs, it is useless for the testator to attempt to impose any fetter upon their enjoyment of it in full so soon as they attain twenty-one. And upon that principle, unless there is in the will, or in some codicil to it, a clear indication of an intention on the part of the testator, not only that his devisees are not to have the enjoyment of the property he has devised to them until they attain twenty-five, but that some other person is to have that enjoyment, or unless the property is so clearly taken away from the devisees up to the time of their attaining twenty-five, as to induce the court to hold that, as to the previous rents and profits, there has been an intestacy, — the court does not hesitate to strike out of the will any direction that the devisees shall not enjoy it in full until they attain the age of twenty-five years.

In the case before me I find a clear devise to the plaintiff, on his declaring his option to become a partner in the bank, of a life interest in the lands and hereditaments by the will directed to be purchased with the £50,000 (and for which the estate subsequently purchased by the testator in Surrey is substituted by the codicil); and then I find a devise of the testator's residuary real and personal property upon the same trusts as those contained in the previous limitation, — making the plaintiff, therefore, tenant for life of the whole of the testator's residuary estate. I find also in the will a clause in which the testator directs that, if the plaintiff accepts his offer to become a partner, he must promise to continue a partner in the bank for the space of four years. And later in the will I find a direction that the estates therein-before expressed to be conferred for life shall be determinable, as to the person who shall first accept the testator's offer, with his ceasing to be a partner in the bank at any time before the expiration of four years

¹ See *supra*, p. 79, n. 1. — Ed.

from the time of his accepting the offer, except for the reasons or under the circumstances in the will mentioned, or on his becoming bankrupt or insolvent; and as to the others, upon their bankruptcy or insolvency; and then, and not till then, the trustees are to take the rents and profits, and apply them for other purposes, — the obvious inference being, that, until some one of those contingencies happens, the plaintiff is to enjoy the rents and profits. As regards the plaintiff, therefore, I find in the will a clear devise and bequest to him of the whole of this property, subject only to a limitation divesting his interest therein in a certain event, which as yet has not happened.

That being the effect of the will, I find this passage in the codicil: “It is my particular desire that no one shall be put in possession of my estate, or shall enjoy the rent, dividends, and profits of any part thereof, or of any property left by my will or codicil, until he shall attain the age of twenty-five years; and in the mean time the rent, dividends, and profits to accumulate.”

Now, as regards that passage in the codicil, it seems to me that, even if the authority of *Montgomerie v. Woodley*¹ were not so nearly in point as it is, the court would be bound to hold the testator's expressions to relate simply to the enjoyment of the property, and that he did not mean the clause to amount to a revocation of the interests conferred by his will to the extent of the interval between the periods when his devisees should attain twenty-one and twenty-five. To hold that the clause in question amounts to a revocation of those interests would be nothing less than to create an intestacy, — a construction which the court would be most reluctant to adopt; for the direction is simply that, in the mean time, the rent, dividends, and profits are to accumulate: they are not given over.

Besides, there is this further objection to construing the codicil as amounting to a revocation of the estates devised by the will, and a substitution of fresh estates to vest at twenty-five. As regards all the estates by the will devised to the testator's nephews born after his decease, such a construction would have the singular effect pointed out by the Lord Chancellor in *Montgomerie v. Woodley*,² of making them all void; for, by cutting out four years of their interest after attaining twenty-one, it would bring the limitations to the testator's unborn nephews within the rule against perpetuities, by which the whole of such limitations would be void.

The true construction of the codicil is clearly this: there is to be no alteration in the limitations made by the will as regards the persons who are to take, or as regards the time at which their interests are to be vested. But, having said by his will that they should enjoy the property at twenty-one, it occurs to him in the codicil that a young man of

¹ 5 Ves. 522.

² 5 Ves. 527.

twenty-one is not competent to manage his affairs, and, therefore, he desires "that no one shall be put in possession of his estate, or shall enjoy the rents," until he shall attain twenty-five, — every word in the codicil pointing to the enjoyment and user of a gift which is taken under the will, and nothing pointing to a revocation of that gift for any purpose, still less for the mere purpose of creating an intestacy.

It seems to me clear, both upon principle and upon the authorities which were cited, that the clause in the codicil was simply an attempt to put a fetter upon the enjoyment of the property given by the will after the period when the law says the owner of property shall enjoy it.

The result is, that there will be no answer to the first question, the case being not yet ripe for its decision. The answer to the second question will be, that the desire of the testator expressed in the codicil with respect to the accumulations of the rent, dividends, and profits of his estate and property is inoperative. *Decree accordingly.*¹

RE BROWNE'S WILL.

IN CHANCERY, BEFORE SIR JOHN ROMILLY, M. R., JULY 29, 1859.

[*Reported in 27 Beavan, 324.*]

THE testator bequeathed to his three trustees, who were also his executors, the sum of £3,000 £3 per cent consolidated annuities, upon trust, to invest the same in the purchase of a government annuity, or if from any cause a difficulty should arise as to the purchase of a government annuity, then in an office for the insurance of life, or in some other good security, to be payable during the life of Louisa Harris; and to be held upon trust to pay the same unto Louisa Harris for her sole and separate use, free from the debts or control of any husband, and so that she should not anticipate the same. And he declared that her receipt should be a discharge for the same, but that in case of illness or other incapacity of Louisa Harris to give such receipt, it should be lawful for his trustees, in their discretion and of their uncontrollable authority, to dispense with the same, and to manage the said annuity,

¹ Where property is given to trustees upon trust for the children of a certain woman, and in default of children upon trust for another person, the one entitled upon default of children may compel a conveyance of the property by the trustee as soon as the woman not having children has become so old that in the estimation of the court she must continue childless. *Forty v. Reay*, Dart V. & P. (5th ed.) 345; *Groves v. Groves*, 12 W. R. 45; *Re Widdow's Trusts*, L. R. 11 Eq. 408; *Re Millner's Estate*, L. R. 14 Eq. 245; *Brown v. Taylor*, W. N. (1872), 190; *Archer v. Dowsing*, W. N. (1879), 43; *Re Taylor*, 29 W. R. 350; *Croxton v. May*, 9 Ch. D. 388. — Ed.

and from time to time to apply the same for the maintenance and support, or otherwise for the personal benefit of Louisa Harris, during her life, at such times and in such manner as his trustees should think most conducive to her comfort and convenience.

Louisa Harris, who was unmarried, being advised that she was entitled to have the £3,000 consols transferred to her, instead of the annuity directed to be purchased therewith, elected to have the sum of consols transferred to her instead of the annuity, and she gave the executors notice requiring them to transfer it to her. They refused so to do, and paid the amount into court under the Trustee Relief Act.

Louisa Harris now presented a petition, praying a declaration that she was entitled to the £3,000 consols, and that it might be transferred to her accordingly.

Mr. Selwyn and *Mr. Fischer* cited *Ford v. Batley*.¹

Mr. Hobhouse, for the executors.

THE MASTER OF THE ROLLS held that the petitioner was entitled to have the consols transferred to her.²

Re PHILBRICK'S SETTLEMENT.

IN CHANCERY, BEFORE SIR JOHN ROMILLY, M. R., MARCH 27, 1865.

[*Reported in 34 Law Journal Reports, Chancery, 368.*]

By a deed-poll, dated the 4th of March, 1846, a fund was vested in trustees, upon trust, for the separate use of Hannah Philbrick, a married woman, for her life, and after her death upon such trusts as she should by will appoint.

By her will, dated the 20th of June, 1856, and expressed to be made in pursuance of the power, Hannah Philbrick appointed the fund to various persons, giving a life-interest in part of it to her husband, and appointed two executors.

She died in June, 1864, and her executors proved her will.

The trustees of the deed-poll being in doubt whether they ought to hand over the trust-fund to the executors, or to distribute it themselves among the appointees, paid the fund into court under the Trustee Relief Act.

The executors thereupon presented a petition for the payment to them of the fund, to be administered by them in accordance with the appointment contained in the will.

¹ 17 Beav. 303.

² See *Pearson v. Lane*, 17 Ves. 101. See also *Ford v. Batley*, 17 Beav. 303. — ED.

Mr. Baggallay and *Mr. Hardy*, for the petitioners.

Mr. Charles Ball, for the trustees of the deed-poll, submitted that they were the proper persons to distribute the fund. Property appointed by will under a general power was, before the passing of the 23 Vict. c. 15, held to be exempt from probate duty, on the ground that the executor could not administer it. *Platt v. Routh*.¹ And the statute which imposes the duty, by directing that it shall be paid by the trustees, appears to recognize their obligation to distribute the property among the appointees.

THE MASTER OF THE ROLLS said, that where the donee of a general power appointed the property to certain persons beneficially, the original trustees were bound to carry the appointment into execution; but if the donee appointed the property to trustees, those trustees were entitled to receive the property to be held upon the trusts declared by the donee; and when a married woman made a will in exercise of a power, and appointed executors, inasmuch as she could only make her will by virtue of the power, and could only have appointed the executors for the purpose of administering the appointed property, she must be considered to have appointed the property to the executors as trustees.

The expression in the judgment in *Platt v. Routh*, that the executor could not have administered any part of the appointed property, only meant that, "but for the will exercising the power," the executor could not have administered.

By the appointment of executors, the duty of administering the fund was, in his Honor's opinion, taken away from the original trustees, and committed to the executors; and the provisions of the 23 Vict. c. 15, rather confirmed this view than otherwise. The fund must, therefore, be paid to the petitioners.²

¹ 6 M. & W. 756, 791; s. c. 10 L. J. N. s. Exch. 105.

² *Cooper v. Thornton*, 3 Bro. C. C. 96, 186; *Angier v. Stannard*, 3 M. & K. 566, 571; *Wetherell v. Wilson*, 1 Keen, 80, 86; *Poole v. Pass*, 1 Beav. 600; *Onslow v. Wallis*, 16 Sim. 483; 1 Mac. & G. 506; *Hayes v. Oatley*, L. R. 14 Eq. 1; *Re Hoskin's Trusts*, 5 Ch. D. 229; 6 Ch. D. 281, s. c., *accord*.

In the last case cited, Sir W. M. James, L. J., said, p. 283: "I may add that, if the merits had to be gone into, I should hold it to be established beyond all question that where a *feme covert*, or any other person having a general power of appointment over a fund of personalty, makes an appointment of the fund by will, and appoints an executor, the executor, when he has proved the will, is entitled to receive the appointed fund." — ED.

BUSK v. ALDAM.

IN CHANCERY, BEFORE SIR R. MALINS, V. C., NOVEMBER 3, 1874.

[Reported in Law Reports, 19 Equity, 16.]

DEMURRER. Thomas Benson Pease made his will, dated the 12th of November, 1839, and thereby, after appointing the defendants his executors, bequeathed to them a sum of £5,000 upon trust to invest as therein mentioned, and upon further trust during the life of his daughter Hannah Ford to pay and apply the annual interest and produce of the £5,000, and the stocks, funds, shares, and securities wherein the same might be from time to time invested according to the written directions, or into the hands of his daughter Hannah Ford for her separate use without power of anticipation; and from and immediately after the decease of his daughter Hannah Ford the £5,000, and the stocks, funds, shares, and securities wherein the same might be invested, were to remain and be in trust for all and every or such one or more exclusively of the other or others of the children of his daughter Hannah Ford, or of all and every or such one or more exclusively of the other or others of any issue (born in the lifetime of his daughter Hannah Ford) of any such child or children for the time being deceased, with such provisions for their respective maintenance, education, and advancement, and at such time or respective times (not happening after twenty-one years to be computed from the decease of his daughter Hannah Ford), and if more, then in such shares and charged with such annual sums of money and limitations over for the benefit of the said children or issue, or some or one of them, and upon such conditions, with such restrictions, and in such manner as his daughter Hannah Ford by deed, or by her last will in writing, or any codicil or codicils thereto to be by her signed in the presence of and attested by two or more credible witnesses, should from time to time direct or appoint. And the testator, after making dispositions for the event of there being no appointment, provided that until the sum of £5,000, and the said stocks, funds, shares, and securities should vest absolutely in some person or persons under the trusts thereinbefore declared concerning the same, the trustees or trustee for the time being should receive the annual produce thereof, or such part or parts thereof as should be unapplied under the trusts and provisos thereinbefore declared and contained, and should invest the same as therein mentioned, so that the same and all the resulting income thereof might, during such suspense of vesting as therein mentioned, accumulate in the way of compound interest, and should from time to time vary the investments of such

annual produce and accumulations at their or his discretion. The testator also gave to the defendants, their executors, administrators, or assigns, the sum of £10,000, to be paid or set apart upon trust for the benefit of his daughter Susannah Pease and her issue, from and immediately after his death, and to bear interest at the rate therein mentioned from such death; and he willed and directed that the said trustees, and the survivors or survivor of them, and their or his executors, administrators, or assigns (as the case might be), should stand and be possessed of the said sum of £10,000 upon and for the like trusts, intents, and purposes, and with, under, and subject to the like powers, provisos, limitations, and declarations in all respects in favor and for the benefit of his daughter Susannah Pease, and of the issue of his said daughter, with the like limitations over to her, her executors, administrators, appointees, and assigns, or next of kin in case of the failure, or her issue, as were thereinbefore declared, limited, and contained of and concerning the sum of £5,000 bequeathed as thereinbefore mentioned in favor or for the benefit of Hannah Ford and her issue.

The testator died on the 24th of May, 1840. Susannah Pease, on the 4th of November, 1851, married Edward Thomas Busk. A settlement was executed on the marriage which did not affect the £10,000 given by the will. Mrs. Busk, by her will, dated the 19th of March, 1868, made some pecuniary and specific bequests, and then, in exercise of the power in that behalf given to her by the will of her father, Thomas Benson Pease, appointed that £7,000, part of the £10,000 by the testator's will bequeathed upon trust for the benefit of herself and her issue, or of or out of the investments thereof, should be held upon certain trusts for the benefit of her daughter Edith Busk, with limitations over in favor of her other children, and she appointed that the residue of the £10,000 should be held upon certain trusts in favor of others of her children. And the testatrix thereby appointed and declared that the said sum of £7,000 and any other property for the time being subject to the trusts thereinbefore declared in favor of her daughter, and also the share or property to which any minor should, or if of full age would, be entitled under or by virtue of her will, should be paid and transferred to her trustees or trustee, and that her trustees should either permit such part thereof as should consist of any investment, or any part thereof, to remain in its actual state of investment, or should sell and invest in the manner therein mentioned, which gave a greater range of investments than had been allowed by the will of Thomas Benson Pease.

The testatrix died on the 30th of January, 1873; and it was stated at the bar, though the fact did not appear by the bill, that she left children who were still infants.

The bill was filed by the trustees of Mrs. Busk's will against the trustees of Thomas Benson Pease's will, and prayed that the defendants might be ordered to pay the £10,000 to the plaintiffs as trustees of Mrs. Busk's will.

The defendants demurred for the purpose of raising in the most expeditious mode the question of the right to have the fund transferred to the trustees appointed by Mrs. Busk.

Mr. Davey, in support of the demurrer. The question is, whether the plaintiffs can give a legal discharge to the defendants for the fund. If they can satisfy the court that they are authorized to do so, the defendants will not raise any objection to handing over the fund to them.

Mr. Cookson, in support of the bill. The result of the authorities is, that a person having power to appoint may interpose trustees between the persons having charge of the fund and the objects of the power, and the trustees so appointed will be the persons to apply the appointed fund. *Cowx v. Foster*¹ is a case in which a fund was directed to be handed over to a second set of trustees. The series of authorities begins with *Kenworthy v. Bate*,² in which an appointment of real estate was held valid notwithstanding the intervention of trustees. In *Thornton v. Bright*,³ an appointment was sustained as being legally valid notwithstanding the intervention of a term of five hundred years vested in trustees; and in *Trollope v. Linton*⁴ the same principle was supported. *Cowx v. Foster* was the case of a bill by trustees so interposed for specific performance of a contract for sale entered into by them as such trustees, and a title under them was forced upon the purchaser. *Fowler v. Cohn*⁵ followed the same rule.

[THE VICE-CHANCELLOR. Do you contend that a mere appointment of the fund to trustees for the objects of the power would be a valid appointment so as to change the trustees?]

It is not a question whether the appointee has the power to change the trustees, but whether the court will give effect to an interposition of trustees. On this principle, in *Ferrier v. Jay*,⁶ in this branch of the court, a fund was directed to be transferred to the second set of trustees. In this case there is a manifest convenience in having only one set of trustees to be dealt with.

SIR R. MALINS, V. C., after stating the facts, continued: So far as the appointment by Mrs. Busk to trustees is concerned, it has been held by a long series of decisions that it is a valid exercise of the power of appointment, and that the appointment is just as good as if it had been made direct to the objects of the power. But this bill is filed for the purpose of having the fund transferred from the trustees in

¹ 1 J. & H. 30.

² 6 Ves. 793.

³ 2 My. & Cr. 230.

⁴ 1 S. & S. 477.

⁵ 21 Beav. 360.

⁶ Law Rep. 10 Eq. 550.

whose control it is now placed to those to whom it is appointed. For what object this is desired I cannot understand. It is said that it would be very convenient to have the fund placed in the hands of the new trustees. But I cannot look at that. I must consider what was intended to be done by the original testator; and I can see that such a transfer as is asked would violate his intention. I asked Mr. Cookson whether he contended that a mere appointment of new trustees by the donee of the power would have been valid, and he pressed upon me that, on the authority of the cases cited, the court was bound to hand over the fund to the new trustees.

Now there is, first of all, the case of *Thornton v. Bright*,¹ which simply decides that an appointment to a person not an object of a power as trustee for a person who is an object is a valid exercise of the power; and there are also *Kenworthy v. Bate*,² *Trollope v. Linton*,³ *Cowx v. Foster*,⁴ and *Fowler v. Cohn*.⁵ But those were all cases where there was real estate to be converted and no person appointed to effect the conversion, and it was decided that in that case an appointment to trustees to sell and convert and distribute the proceeds amongst the objects of the power was a valid execution of the power. But I am unable to see how that can be an authority for taking away a fund from trustees who are fit and proper, and handing it over to others who may not be so fit, in a case where the duty of the trustees is simply to hold the fund.

I am asked to treat these cases as establishing a general law, that where, in all cases, a fund is settled upon trust for a mother for life, and then upon trust for her children as she should appoint, and she appoints to trustees for her children, the first trustees are bound to hand over the fund to the trustees appointed by the daughter. Here nothing more is required than that some one should hold the fund, and it is suggested that I am bound to hand it over to the second trustees.

Mr. Cookson says that I decided the point in *Ferrier v. Jay*.⁶ But what I there decided was, that where there was a general and a special power, and an appointment was made of both funds together to trustees in trust to pay debts and to apply the residue for the objects of the special power, the appointment must be read *reddendo singula singulis*, and the fund coming under the general power applied in the first instance to the purposes to which the fund subject to the special power was not applicable. I agreed with the decision in *Cowx v. Foster*,⁷ that the circumstance of directing debts to be paid only meant that they

¹ 2 My. & Cr. 230.

² 1 S. & S. 477.

³ 21 Beav. 360.

⁴ 1 J. & H. 30.

⁵ 6 Ves. 793.

⁶ 1 J. & H. 30.

⁷ Law Rep. 10 Eq. 550.

were to be paid out of the particular portion of the mixed fund which could be so applied.

I did also in that case undoubtedly say that the second trustees were the most fit persons to have charge of the fund ; but I did not say that where it was a mere question which of two sets of trustees should hold a particular fund, the court would necessarily hand it over to the second set in point of date.

The demurrer will be allowed.

SECTION III.

The Right of a Cestui que Trust to the Possession and Profits of Trust Property.

BLAKE v. BUNBURY.

IN CHANCERY, BEFORE LORD THURLOW, C., JUNE 30, 1790.

[*Reported in 1 Vesey, Jr. 194.*¹]

SIR PATRICK BLAKE was tenant for life by the will of his father, subject to a term under which the real estate was charged with a sum sufficient with the personal to answer the purposes of the trust. Upon coming of age he filed a bill; and a general account was directed of testator's estates, and of debts, legacies, and funeral expenses.

Solicitor-General (*Sir John Scott*), for plaintiff, desired that he might be immediately let into possession, insisting that he was in the common case of tenant for life, where the court is in the constant habit of letting into possession upon keeping down the interest, and that in case of failure a receiver may be appointed. The real estate, he said, would be liable to a very small amount; he complained in strong terms of the conduct of the trustees.

LORD CHANCELLOR (THURLOW). This ought to have been finished long ago; for, though the plaintiff is but just of age, he might have sued by his next friend. But it is impossible for me to let him into possession till I have the account before me, and even till the trusts are executed, unless, as he now offers, he pays into court a sum sufficient to answer all the purposes of the trust. Whenever he does that I will let him into immediate possession. The court perhaps has let tenant for life into possession, where it has seen that the best way of performing the trusts would be by letting him into possession; as where an annuity of £100 a year is charged upon an estate of £5,000 a year. But till the account is taken I do not know but the purposes of the trust may take up the whole; and if I was to do it now, perhaps I should only have to resume the estate.

¹ 1 Ves. Jr. 514; 4 Bro. C. C. 21, s. c. — ED.

KAYE v. POWEL.

IN CHANCERY, BEFORE LORD THURLOW, C., DECEMBER 14, 1791.

[Reported in 1 Vesey, Jr. 408.]

TRUSTEES joined with a remainder-man to put his mother, who was tenant for life of the estate under the trust, out of possession ; and they went round together to the tenants, and desired them not to pay her any more rent. The trustees produced evidence of subsequent failures of tenants, &c., which occasioned a deficiency in the rent.

Mr. Mansfield and *Mr. Graham*, for the trustees, admitted that they had acted improperly, but said that the subsequent events ought to be taken into consideration ; and that they ought only to be compelled to make good what would have been the actual receipts of the tenant for life, supposing she had continued in possession, not the actual rent reserved ; that as there was no *lata culpa* in the trustees so as to draw on them severe censure, the court would inquire into the reality of the transaction.

LORD CHANCELLOR (THURLOW). The conduct of these trustees cannot be justified ; and this court cannot sit by and see them act in such a manner. After they have actually ejected their *cestui que trust* by collusion with the remainder-man, the question is, whether the rule by which I am to restore the *cestui que trust* is what the estate might possibly have been let for and have produced afterwards (for which I must enter into all that discussion), or whether I should not take it up the shortest way by saying that it was the fault of the trustees to meddle with the business at all ; and therefore they must make it good according to the terms of the contract. I think, if people will totally turn another out of possession of an estate let for a certain sum, my business is not to inquire into subsequent circumstances, but whether that is not the sum, from the receipt of which the party was turned out. The true rule is to make them pay what the tenants are bound to pay. Let the Master compute the loss according to the leases existing at the time, and also inquire in what manner the remainder-man interfered with the trustees in taking away the possession from his mother during her life.

TIDD v. LISTER AND OTHERS.

IN CHANCERY, BEFORE SIR JOHN LEACH, V. C., NOVEMBER 20, 1820.

[Reported in 5 Maddock, 429.]

THE bill in this case was filed by a *feme covert* and her husband against the trustees under her father's will, and prayed a legal conveyance of a life-estate, to which the wife was equitably entitled by the will, or for a receiver, or for delivery of possession of the estate.

The will directed the trustees to pay the premiums of certain policies of assurance, in the first place, out of the rents and profits; and the plaintiffs offered to bring as much money into court as would secure the premiums.

The facts of the case, and the questions raised, are fully stated in the judgment.

The claim to a conveyance was abandoned, but *Mr. Sugden*, for the plaintiff, insisted upon a right to possession as a matter of course, and cited *Blake v. Bunbury*.

Mr. Hart, *Mr. Bell*, and *Mr. Palmer*, for the defendant Lister.

Mr. Blackburne, for the trustees.

THE VICE-CHANCELLOR. The testator in this case, after giving to his wife and daughter the personal occupation of the house in which he resided, and the use of his furniture, has devised and bequeathed his whole real and personal property to certain trustees upon trust, in the first place, to pay his funeral expenses and debts, then to keep the buildings upon his estate, consisting of freehold, copyhold, and leasehold, insured against loss or damage by fire; next, to pay the premiums of certain policies of assurance on the lives of his two sons, which are to form a provision for their widows and children; then to pay annuities of sixty guineas each to his two sons; and, lastly, he has given the surplus income between his wife and daughter during their joint lives, and the whole surplus income to the survivor for life; and in case his two sons should survive his wife and daughter, then he gives to them his whole real and personal estate. Soon after the death of the testator, a bill was filed in this court for the execution of the trusts of his will, and in the progress of that suit the debts and funeral expenses were paid out of the personal estate, and the residue of the personal estate was secured in the name of the Accountant-General, and is of an amount sufficient to satisfy the two annuities of sixty guineas each, given to the sons, who do accordingly receive the same from the Accountant-General. The premiums of the policies of assurance continue to be paid out of the rents and profits of the estates.

The mother died in the year 1819, and the daughter, who is become entitled to the whole surplus income of the real and personal estate, has married. The mother, the two sons, and two other persons were the trustees named in the will; one of these persons is dead, the other has but little interfered in the trusts of the will, one of the sons is abroad, and the management of the property has principally devolved upon the son William Lister. The present bill is filed by the daughter and her husband, praying a conveyance, surrender, and assignment of the legal estate from the trustees, and that the plaintiffs may be let into possession, or that a receiver may be appointed. The prayer for the conveyance, surrender, and assignment was abandoned at the bar, but it was insisted that it is a matter of course in a court of equity, to divest a trustee of the management of the trust property, and to deliver the possession to the *cestui que trust* for life. And that the only difficulty here was, that the trustees are in the first place directed to pay certain premiums upon policies of assurance, which remained to be provided for out of the rents and profits of the estates, and that to remove this difficulty the daughter's husband was willing to invest in the cause a sum sufficient to answer the amount of those annual payments; and the case of *Blake v. Bunbury* was cited as an authority for this doctrine.

My first impressions were strongly against the existence of any such rule. It is perfectly plain from the continuing nature of this trust that the testator intended that the actual possession of the trust property should remain with the trustees; and it did appear to me a singular proposition that if a testator who gives in the first instance a beneficial interest for life only, thinks fit to place the direction of the property in other hands, which is an obvious means of securing the provident management of that property for the advantage of those who are to take in succession, that it should be a principle in a court of equity to disappoint that intention, and to deliver over the estate to the *cestui que trust* for life, unprotected against that bias which he must naturally have to prefer his own immediate interest to the fair rights of those who are to take in remainder. Independently of the purpose of management of the property, a testator may be considered in the case of a female *cestui que trust* for life, as having a further view to her personal protection in the case of her marriage.

The husband can only compel the trustee to account to him for the wife's income by the aid of a court of equity; and this court, in certain cases of misconduct by the husband, will not compel the trustee to account to the husband, but will secure the income for the benefit of the wife. It is manifest that this protection would, to some extent, be prejudiced, if the husband were put into the possession of the trust estate.

The case of *Blake v. Bunbury* is no authority for the proposition for which it was cited. It was not the case of a *cestui que trust* for life, but the case of a legal tenant for life, subject to a term for raising a charge. There was there no purpose but to raise the charge, and the legal tenant for life, securing the charge, had upon every principle a right to the possession. There may be cases in which it may be plain from the expressions in the will that the testator did not intend that the property should remain under the personal management of the trustees. There may be cases in which it may be plain from the nature of the property that the testator could not mean to exclude the *cestui que trust* for life from the personal possession of the property, as in the case of a family residence. There may be very special cases in which this court would deliver the possession of the property to the *cestui que trust* for life, although the testator's intention appeared to be that it should remain with the trustees, as where the personal occupation of the trust property was beneficial to the *cestui que trust*, there the court taking means to secure the due protection of the property for the benefit of those in remainder, would, in substance, be performing the trust according to the intention of the testator. The present case is not one of special circumstances. It is not the personal occupation, but the management of the property that is sought by this bill.

The *cestui que trust* for life is a *feme covert*. Two of the trustees are the persons who, if they survive the wife, will be entitled to this property. The testator has thought fit to place his property in their hands, and out of the management of the *cestui que trust* for life, and I have no authority to revoke his will.

There is, however, in this bill a prayer for a receiver, and allegations of misconduct to support that prayer. These allegations are denied by the answer, and not proved. But I find in the answer that the acting trustee, William Lister, expresses himself to be willing that a receiver should be appointed. If the plaintiffs desire a receiver, they are entitled to it upon this consent of the trustee.¹

¹ See, to the same effect, *Jenkins v. Milford*, 1 J. & W. 629; *Naylor v. Arnitt*, 1 Russ. & M. 501; *Baylies v. Baylies*, 1 Coll. 537; *Denton v. Denton*, 7 Beav. 388; *Pugh v. Vaughan*, 12 Beav. 517; *Horner v. Wheelwright*, 2 Jur. N. s. 367; *Hoskins v. Campbell*, W. N. (1869) 59; *Etchells v. Williamson*, W. N. (1869) 61; *Taylor v. Taylor*, L. R. 20 Eq. 297; 3 Ch. D. 145, s. c.; *Williamson v. Wilkins*, 14 Ga. 416; *Young v. Miles*, 10 B. Mon. 287; *Moseley v. Marshall*, 22 N. Y. 200; *Weekham v. Berry*, 55 Pa. 70. — ED.

SECTION IV.

What Interest in Trust Property may be transferred by a Cestui que Trust.

DEARLE v. HALL.

IN CHANCERY, BEFORE LORD LYNTHURST, C., DECEMBER 24, 1828.

[Reported in 3 Russell, 48.]

THE LORD CHANCELLOR.¹ The cases of *Dearle v. Hall* and *Loveridge v. Cooper* were decided by Sir Thomas Plumer; and from his decree there is in each of them an appeal, which stands for judgment. As the two cases depend on the same principle, though the facts are, to a certain degree, different, the better course will be to dispose of both together; and as *Dearle v. Hall* was the first of the two which came before the court below, though it was not argued on appeal till after *Loveridge v. Cooper* had been heard, I shall first direct my attention to the facts on which it depends.

Zachariah Brown was entitled, during his life, to about £93 a year, being the interest arising from a share of the residue of his father's estate, which, in pursuance of the directions in his father's will, had been converted into money, and invested in the names of the executors and trustees. Among those executors and trustees was a solicitor of the name of Unthank, who took the principal share in the management of the trust. Zachariah Brown, being in distress for money, in consideration of a sum of £204, granted to Dearle, one of the plaintiffs in the suit, an annuity of £37 a year, secured by a deed of covenant and a warrant of attorney of the grantor and a surety; and, by way of collateral security, Brown assigned to Dearle all his interest in the yearly sum of £93: but neither Dearle nor Brown gave any notice of this assignment to the trustees under the father's will.

Shortly afterwards, a similar transaction took place between Brown and the other plaintiff, Sherring, to whom an annuity of £27 a year was granted. The securities were of a similar description; and, on this occasion, as on the former, no notice was given to the trustees.

These transactions took place in 1808 and 1809. The annuities were regularly paid till June, 1811; and then, for the first time, default was made in payment.

Notwithstanding this circumstance, Brown, in 1812, publicly adver-

¹ See *supra*, p. 79, n. 1. — Ed.

tised for sale his interest in the property under his father's will. Hall, attracted by the advertisement, entered, through his solicitor, Mr. Patten, into a treaty of purchase; and it appears from the correspondence between Mr. Patten and Mr. Unthank that the former exercised due caution in the transaction, and made every proper inquiry concerning the nature of Brown's title, the extent of any incumbrances affecting the property, and all other circumstances of which it was fit that a purchaser should be apprised. No intimation was given to Hall of the existence of any previous assignment; and, his solicitor being satisfied, he advanced his money for the purchase of Brown's interest, and that interest was regularly assigned to him. Mr. Patten requested Unthank to join in the deed; but Mr. Unthank said, "I do not choose to join in the deed; and it is unnecessary for me to do so, because Z. Brown has an absolute right to this property, and may deal with it as he pleases." The first half-year's interest, subject to some deductions, which the trustees were entitled to make, was duly paid to Hall; and, shortly afterwards, Hall for the first time ascertained that the property had been regularly assigned, in 1808 and 1809, to Dearle and to Sherring.

Sir Thomas Plumer was of opinion that the plaintiffs had no right to the assistance of a court of equity to enforce their claim to the property as against the defendant Hall, and that, having neglected to give the trustees notice of their assignments, and having enabled Z. Brown to commit this fraud, they could not come into this court to avail themselves of the priority of their assignments in point of time, in order to defeat the right of a person who had acted as Hall had acted, and who, if the prior assignments were to prevail against him, would necessarily sustain a great loss. In that opinion I concur.¹

¹ The substance of the opinion of Sir Thomas Plumer, M. R., is contained in the following extract:—

"The ground of this claim is priority of time. They rely upon the known maxim, borrowed from the civil law, which in many cases regulates equities, — '*qui prior est in tempore, potior est in jure.*' If, by the first contract, all the thing is given, there remains nothing to be the subject of the second contract, and priority must decide. But it cannot be contended that priority in time must decide, where the legal estate is outstanding. For the maxim, as an equitable rule, admits of exception, and gives way, when the question does not lie between bare and equal equities. If there appears to be, in respect of any circumstance independent of priority of time, a better title in the puisne purchaser to call for the legal estate than in the purchaser who precedes him in date, the case ceases to be a balance of equal equities, and the preference, which priority of date might otherwise have given, is done away with and counteracted. The question here is, not which assignment is first in date, but whether there is not, on the part of Hall, a better title to call for the legal estate than Dearle or Sherring can set up; or rather the question is, Shall these plaintiffs now have equitable relief to the injury of Hall?

"What title have they shown to call on a court of justice to interpose on their behalf,

It was said that there was no authority for the decision of the Master of the Rolls, — no case in point to support it; and certainly it does

in order to obviate the consequences of their own misconduct? All that has happened is owing to their negligence (a negligence not accounted for) in forbearing to do what they ought to have done, what would have been attended with no difficulty, and what would have effectually prevented all the mischief which has followed. Is a plaintiff to be heard in a court of equity, who asks its interposition in his behoof, to indemnify him against the effects of his own negligence at the expense of another who has used all due diligence, and who, if he is to suffer loss, will suffer it by reason of the negligence of the very person who prays relief against him? The question here is not, as in *Evans v. Bicknell*, whether a court of equity is to deprive the plaintiffs of any right, — whether it is to take from them, for instance, a legal estate, or to impose any charge upon them. It is simply, whether they are entitled to relief against their own negligence. They did not perfect their securities; a third party has innocently advanced his money, and has perfected his security as far as the nature of the subject permitted him: is this court to interfere to postpone him to them?

“They say that they were not bound to give notice to the trustees; for that notice does not form part of the necessary conveyance of an equitable interest. I admit that, if you mean to rely on contract with the individual, you do not need to give notice; from the moment of the contract he, with whom you are dealing, is personally bound. But if you mean to go further, and to make your right attach upon the thing which is the subject of the contract, it is necessary to give notice; and, unless notice is given, you do not do that which is essential in all cases of transfer of personal property. The law of England has always been, that personal property passes by delivery of possession; and it is possession which determines the apparent ownership. If, therefore, an individual, who in the way of purchase or mortgage contracts with another for the transfer of his interest, does not divest the vendor or mortgagor of possession, but permits him to remain the ostensible owner as before, he must take the consequences which may ensue from such a mode of dealing. That doctrine was explained in *Ryall v. Rowles* (1 Ves. Sen. 348; 1 Atk. 165), before Lord Hardwicke and three of the judges. If you, having the right of possession, do not exercise that right, but leave another in actual possession, you enable that person to gain a false and delusive credit, and put it in his power to obtain money from innocent parties on the hypothesis of his being the owner of that which in fact belongs to you. The principle has been long recognized, even in courts of law. In *Twyne’s Case* (3 Rep. 80), one of the badges of fraud was, that the possession had remained in the vendor. Possession must follow right; and if you who have the right do not take possession, you do not follow up the title, and are responsible for the consequences.

“‘When a man,’ says Lord Bacon (Maxims of the Law, max. 16), ‘is author and mover to another to commit an unlawful act, then he shall not excuse himself by circumstances not pursued.’

“It is true that a chose in action does not admit of tangible actual possession, and that neither Zachariah Brown nor any person claiming under him were entitled to possess themselves of the fund which yielded the £93 a year. But in *Ryall v. Rowles* the judges held that, in the case of a chose in action, you must do everything towards having possession which the subject admits; you must do that which is tantamount to obtaining possession, by placing every person who has an equitable or legal interest in the matter under an obligation to treat it as your property. For this purpose you must give notice to the legal holder of the fund; in the case of a debt, for instance, notice to the debtor is, for many purposes, tantamount to possession. If you omit to give that notice, you are guilty of the same degree and species of neglect as he who

not appear that the precise question has ever been determined, or that it has been even brought before the court, except, perhaps, so far as it may have been discussed in an unreported case of *Wright v. Lord Dorchester*. But the case is not new in principle. Where personal property is assigned, delivery is necessary to complete the transaction, not as between the vendor and the vendee, but as to third persons, in order that they may not be deceived by apparent possession and ownership remaining in a person, who, in fact, is not the owner. This doctrine is not confined to chattels in possession, but extends to choses in action, bonds, &c.; in *Ryall v. Rowles*¹ it is expressly applied to bonds, simple-contract debts, and other choses in action. It is true that *Ryall v. Rowles* was a case in bankruptcy; but the Lord Chancellor called to his assistance Lord Chief Justice Lee, Lord Chief Baron Parker, and Mr. Justice Burnett; so that the principle on which the court there acted must be considered as having received most authoritative sanction. These eminent individuals, and particularly the Lord Chief Baron and Mr. Justice Burnett, did not, in the view which they took of the question before them, confine themselves to the case of bankruptcy, but stated grounds of judgment which are of general application. Lord Chief Baron Parker says, that, on the assignment of a bond debt, the bond should be delivered, and notice given to the debtor; and he adds, that, with respect to simple-contract debts, for which no securities are holden, such as book-debts for instance, notice

leaves a personal chattel, to which he has acquired a title in the actual possession, and under the absolute control, of another person.

"Is there the least doubt that, if Zachariah Brown had been a trader, all that was done by Dearle and Sherring would not have been in the least effectual against his assignees; but that, according to the doctrine of *Ryall v. Rowles*, his assignees would have taken the fund, because there was no notice to those in whom the legal interest was vested? In that case it was the opinion of all the judges that he who contracts for a chose in action, and does not follow up his title by notice, gives personal credit to the individual with whom he deals. Notice, then, is necessary to perfect the title, — to give a complete right *in rem*, and not merely a right as against him who conveys his interest. If you are willing to trust the personal credit of the man, and are satisfied that he will make no improper use of the possession in which you allow him to remain, notice is not necessary, for against him the title is perfect without notice. But if he, availing himself of the possession as a means of obtaining credit, induces third persons to purchase from him as the actual owner, and they part with their money before your pocket-conveyance is notified to them, you must be postponed. In being postponed, your security is not invalidated: you had priority, but that priority has not been followed up; and you have permitted another to acquire a better title to the legal possession. What was done by Dearle and Sherring did not exhaust the thing (to borrow the principle of the civil law), but left it still open to traffic. These are the principles on which I think it to be very old law, that possession, or what is tantamount to possession, is the criterion of perfect title to personal chattels, and that he who does not obtain such possession must take his chance." 3 Russ. 20–24. — Ed.

¹ 1 Ves. Sen. 348; 1 Atk. 165.

of the assignment should be given to the debtor, in order to take away from the debtor the right of making payment to the assignor, and to take away from the assignor the power and disposition over the thing assigned. 1 Ves. Sen. 367; 2 Atk. 177. In cases like the present, the act of giving the trustee notice is, in a certain degree, taking possession of the fund; it is going as far towards equitable possession as it is possible to go; for, after notice given, the trustee of the fund becomes a trustee for the assignee who has given him notice. It is upon these grounds that I am disposed to come to the same conclusion with the late Master of the Rolls.

I have alluded to a case of *Wright v. Lord Dorchester*, which was cited as an authority in support of the opinion of the Master of the Rolls. In that case, a person of the name of Charles Sturt was entitled to the dividends of certain stock, which stood in the names of Lord Dorchester and another trustee. In 1793 Sturt applied to Messrs. Wright & Co., bankers at Norwich, for an advance of money, and, in consideration of the moneys which they advanced to him, granted to them two annuities, and assigned his interest in the stock as a security for the payment. No notice was given by Messrs. Wright & Co. to the trustees. It would appear that Sturt afterwards applied to one of the defendants, Brown, to purchase his life interest in the stock; Brown then made inquiry of the trustees, and they stated that they had no notice of any incumbrance on the fund: upon this B. completed the purchase, and received the dividends for upwards of six years. Messrs. Wright then filed a bill, and obtained an injunction, restraining the transfer of the fund or the payment of the dividends; but, on the answer of Brown, disclosing the facts with respect to his purchase, Lord Eldon dissolved that injunction. At the same time, however, that he dissolved the injunction, he dissolved it only on condition that Brown should give security to refund the money, if, at the hearing, the court should give judgment in favor of any of the other parties. That case was attended also with this particular circumstance, that the party who pledged the fund stated by his answer that, when he executed the security to Wright & Co., he considered that the pledge was meant to extend only to certain real estates. For these reasons I do not rely on the case of *Wright v. Lord Dorchester* as an authority: I rest on the general principle to which I have referred; and, on that principle, I am of opinion that the plaintiffs are not entitled to come into a court of equity for relief against the defendant Hall. The decree must, therefore, be affirmed, and the deposit paid to Hall.

The case of *Loveridge v. Cooper*, though the circumstances are somewhat different, is the same in principle with *Dearle v. Hall*, and must follow the same decision.¹

¹ It will be observed that the second purchaser in the principal case made due inquiry of the trustees as to prior incumbrances, and made his purchase upon their

LEE v. HOWLETT.

IN CHANCERY, BEFORE SIR W. PAGE WOOD, V. C., MARCH 11, 1856.

[*Reported in 2 Kay & Johnson, 531.*]

TIMOTHY TRIPP LEE, by his will, dated the 30th of June, 1840, amongst other devises, gave to his wife Elizabeth (since deceased) certain freehold and leasehold hereditaments, known as Dell's Manor farm,

assurance that there were none, — an assurance which was the natural consequence of the first purchaser's failure to notify the trustees of his purchase. The facts and decision were similar in *Greening v. Beckford*, 5 Sim. 195, and *Parks v. Innes*, 33 Barb. 37. See also *Murdoch v. Finney*, 21 Mo. 138.

The question is obviously very different where the second purchaser makes no inquiry of the trustee before making the purchase, but rests his claim to priority purely upon the fact that his purchase was first notified to the trustee. It is difficult to see how the second purchaser can found any claim upon the neglect of the first purchaser when he has parted with his money in entire ignorance of that neglect. It was nevertheless decided by Lord Lyndhurst in *Hulton v. Sandys*, Younge, 602, and by Lords Lyndhurst and Brougham in *Foster v. Cockerell*, 3 Cl. & Fin. 456, 9 Bligh, n. s. 332, that a first purchaser should be postponed to a subsequent purchaser simply because the former did not, and the latter did, give notice of his purchase to the trustee. To the same effect are *Timson v. Ramsbottom*, 2 Keen, 35; *Meux v. Bell*, 1 Hare, 73; *Etty v. Bridges*, 2 Y. & C. C. C. 486; *Judson v. Corcoran*, 17 How. 612; *Spain v. Hamilton*, 1 Wall. 624. See also *People's Bank v. Gridley*, 91 Ill. 457; *Richards v. Griggs*, 16 Mo. 416; *Smith v. Sterritt*, 24 Mo. 260, 262; *Haldeman v. Hillsborough Co.*, 2 Handy, 101, 105; *Wallston v. Braswell*, 1 Jones Eq. (N. C.) 137.

In *Meux v. Bell*, *supra*, Sir James Wigram, V. C., said, pp. 83-87:—

"I believe that, prior to the decision in Mr. Sturt's case, which occurred in 1809 (*Wright v. Lord Dorchester*, 3 Russ. 49, n.), it had never been held that the mere omission of a person having an equitable interest in a fund, the legal property of which was in another, to give notice of that interest would of itself give a puisne incumbrancer the priority; and I think it is apparent, upon the judgment in *Evans v. Bicknell*, 6 Ves. 190, that Lord Eldon at that time did not consider the mere omission to give notice, where the transaction was quite destitute of fraud, would have that effect. Sir Thomas Plumer also, in 1814, in the case of *Cooper v. Fynmore*, 3 Russ. 60, expressed clearly the law of the court to be that the mere omission to give notice would not postpone a prior to a puisne incumbrancer. . . .

"I conceive it to be now clearly decided, by the cases of *Dearle v. Hall*, *Loveridge v. Cooper*, and *Foster v. Blackstone*, 1 Myl. & K. 297; s. c. reported as *Foster v. Cockerell*, 9 Bligh, n. s. 332, that if a bona fide incumbrancer upon a fund, the legal interest in which is in a trustee, gives notice of his incumbrance to the trustee, and neither the incumbrancer giving the notice, nor the trustee at the time of such notice being given, has notice of any prior incumbrance affecting the fund, the incumbrancer giving such notice, so long as the circumstances of the case remain unaltered, will be entitled to priority over a prior incumbrancer upon the fund who has omitted or neglected to give notice of his incumbrance, although the puisne incumbrancer may have advanced his money without making any previous inquiries of the trustee. . . .

"I think these decisions are founded on principle. The omission of the puisne in-

to hold the same for her life; and, after her decease, the testator directed that the same should be sold by public auction, and that the money should be equally divided among his surviving children; and the testator devised and bequeathed the residue of his property, as well funded or otherwise, to his wife for her life, and after her death, to

cumbrancer to make inquiry cannot be material where inquiry into the circumstances of the case could not have led to a knowledge of the prior incumbrance.

"The question is, whether the inquiry, if it had been made, would or would not have informed the puisne incumbrancer of any material fact affecting his interests. If his conduct would have been the same, whether he had made the inquiry or not, the omission of the inquiry cannot be a reason for depriving him of the benefit of his subsequent vigilance.

"The only suggestion which, it appears to me, can be made in answer to this view of the question is, that if the puisne incumbrancer has not made any inquiry, he has not, in point of fact, been deceived or injured by the neglect or omission of the prior incumbrancer. But there is a fallacy in that way of stating the case. If the puisne incumbrancer advances his money *bona fide*, without inquiry, it must be presumed that he would equally have advanced it after inquiry, the result of which would have negatived the existence of any prior incumbrance. The injury he sustains, and which gives him priority, is *ex post facto*. If, after advancing his money, he is informed that there is a prior incumbrance, he will immediately use diligence to get in or secure his property. If, on the other hand, he is not told when he gives the notice that there is a previous incumbrance, he is led to suppose that his security is good; he relies upon it, and he is injured in having placed such reliance upon it if it should appear that there is a prior incumbrance. The notice which, when it is given, has the effect of inquiry is given either at the time the money is advanced or afterwards; and the only distinction between the two cases is a distinction between a party who advances money at the time of taking a security, and a party who takes a security for an antecedent debt. The notice which the puisne incumbrancer gives converts the trustee of the fund into a trustee for the party giving the notice. *Dearle v. Hall*. The credit which the puisne incumbrancer gives to the fund after the notice is as good a consideration as that of any other creditor who takes a security for an antecedent debt, which is clearly sufficient. *Plumb v. Fluitt*, 2 Anst. 432. And the puisne incumbrancer has a better equity than the earlier incumbrancer, because the former by notice to the trustee has perfected his equitable title, which the latter, by omitting or neglecting to give notice, has not done."

The rule in *Dearle v. Hall* has been disapproved in some jurisdictions. *Thayer v. Daniels*, 113 Mass. 129 (*semble*); *McDonald v. Kneeland*, 5 Minn. 352 (*semble*); *Muir v. Schenck*, 3 Hill, 228; *Bush v. Lathrop*, 22 N. Y. 535, 546 (*semble*) (but see *Parks v. Innes*, 33 Barb. 37). In *Thayer v. Daniels*, *supra*, the court, speaking through Devens, J., said, p. 131: "The rule in England would seem to be that, as between successive purchasers of a chose in action, he will have the preference who first gives notice to the debtor, even if he be a subsequent purchaser. . . . Such, however, has not been the rule adopted in this State, where it is well settled that the assignment of a chose in action is complete upon the mutual assent of assignor and assignee, and does not gain additional validity as against third persons by notice to the debtor."

It has been decided that the first assignee of a policy of insurance to whom the policy is delivered will prevail against a subsequent assignee who does not get the policy, even though the insurance company is notified of the second assignment first. *Spencer v. Clarke*, 9 Ch. D. 137. And, it is conceived, the principle of this decision would apply to the assignment of any specialty. — Ed.

be equally divided amongst his surviving children. And he appointed his wife, and his sons, the plaintiff Timothy Lee and Cornelius Lee (since deceased), executrix and executors of his will.

The testator died on the 29th of December, 1840, leaving his widow and eleven children surviving him.

By a deed of arrangement, dated in 1841, and executed by all the children (except one who had died), it was mutually agreed that all the property devised by the testator amongst his surviving children should be divided and disposed of, subject to the life interests therein, in like manner and shares as if the same had been given, subject as aforesaid, amongst all his children who should survive him, equally as tenants in common, so that one equal eleventh part or share thereof should go and be paid and payable to each and every, or to the executors, administrators, or assigns of each and every, the said, &c. (the children), notwithstanding any or either of them, the said, &c., should die before the property should become divisible or payable, and the executors or administrators of any of them who might so die should receive his or her eleventh share, and apply the same as his or her personal estate, &c.

Charles Lee, one of the children, by indenture, dated the 24th of March, 1842, mortgaged his reversionary share and interest of all the property under the will and deed of arrangement to one Simon Main, to secure £450, and interest, of which indenture the plaintiff Timothy Lee had not received notice till the year 1848.

By indenture, dated February 14, 1844, Charles Lee again assigned his share to a Miss Lys to secure £250, and interest; of which indenture Miss Lys gave notice to the plaintiff in May, 1844.

At the time of the mortgage to her, Miss Lys had no notice of the prior mortgage.

By indenture, dated the 1st of October, 1846, Charles Lee again assigned his share to one Gaches, to secure a sum of £300 and interest; of which indenture Gaches gave notice to the plaintiff in the same month of October, 1846.

The testator's widow having died in 1854, this suit was instituted by the plaintiff for the administration of the real estate; a previous suit of "*Lys v. Lee*" had been instituted by Miss Lys to realize her security out of the personal estate, which, however, was wholly exhausted, leaving nothing but the real estate and its produce for the incumbrancers to look to.

A decree for sale had been made in this suit (*Lee v. Howlett*), and the usual inquiry directed as to incumbrances on the shares of the children.

Pursuant to the decree Dell's Manor farm had been sold for £3,400, and the residuary estate for £500. The chief clerk certified as to the incumbrances, and, amongst others, to those on Charles Lee's share as

above; the result of his finding being that the several mortgagees, Vaughan (in whom Simon Main's mortgage had become vested), Miss Lys, and Gaches, were entitled according to the dates of their incumbrances. But it was arranged that the question of priority, with reference to the dates of the several notices given to the plaintiff, should be argued before the court on the hearing for further consideration.

The cause now came on to be so heard.

Mr. Rolt, Q. C., and *Mr. Speed*, for the plaintiff.

Mr. Daniel, Q. C., and *Mr. W. P. Murray*, for Miss Lys. The notice of the mortgage to Miss Lys which was given to the plaintiff, gave that mortgage priority over the other mortgage previously made, but of which no notice had been given. It is true that the mortgagee of an equitable interest in land cannot obtain priority by giving notice to the trustee, because this doctrine of notice does not apply to real estate: *Jones v. Jones*,¹ *Wilmot v. Pike*,² *Malcolm v. Charlesworth*; ³ and this even when the mortgage is of an equitable interest in leaseholds for years: *Wiltshire v. Rabbits*.⁴ But, in this case, the Dell's Manor farm was devised in trust for sale, and only a share in the proceeds of such sale was given to the mortgagor, and the residuary real estate, though not devised in trust for sale, was treated as personal estate by the deed of arrangement; and therefore, as to him and his mortgagees, the property must be considered as personal estate: *Phillips v. Phillips*; ⁵ and that being so, the notice given by Miss Lys gave her priority: *Dearle v. Hall*. The very point was so decided in *Foster v. Cockerell*,⁶ s. c. *nom. Foster v. Blackstone*.⁷

Mr. Bilton, for other parties.

Mr. Cadman Jones, for Vaughan, the first mortgagee. The mortgages must take effect in the order in which they were made. He relied on *Wiltshire v. Rabbits*,⁴ and on the fact that the property was not sold till after the mortgages were made, and that no sale could have been made at the time when the mortgages were executed. He cited also *Rooper v. Harrison*.⁸

VICE-CHANCELLOR SIR W. PAGE WOOD. I am of opinion that as to that portion of the property which was ordered to be sold, I am bound to hold, on the principle of *Foster v. Cockerell*,⁶ *Dearle v. Hall*, and that class of cases, that the incumbrancer who first gave notice of his incumbrance must prevail over the others. The principle does not depend simply on a question of *mala fides*; but the rule is, that the party who first makes himself master of a chose in action, by giving notice, to prevent its being handed over by the person in whose hands it is to any other claimant, — in other words, who first divests the title

¹ 8 Sim. 633.

² 5 Hare, 14.

³ 1 Keen, 63.

⁴ 14 Sim. 76.

⁵ 1 My. & K. 649.

⁶ 9 Bligh, N. S. 332; 3 Cl. & F. 456.

⁷ 1 My. & K. 297.

⁸ 2 Kay & J. 86.

of the owner by giving notice to the person through whom the owner must derive the fund, — arrests that fund, and acquires the property for himself. Whether the fund be a trust fund held by A. in trust for B., or a debt payable by A. to B., if B. assigns, and his assign requires A. to pay the money over to him, that gives him priority over a previous assign of B., who has not given such notice.

It is decided that this doctrine does not apply to real estate;¹ and in *Wiltshire v. Rabbits* ² the late Vice-Chancellor of England considered that the doctrine was not applicable to an assignment of an equitable interest in a chattel real. In this case, part of the property is directed to be sold, without saying by whom. The sale must be by the heir or executors. Here, the same person fills both those characters, and the property must therefore pass through him. It must be converted into money, and none of the legatees could have reached that money except through him; and they could never have had the property in the shape of land, but only as money. Then, the executor being bound to pay the shares in this manner, the fact that, at the time when this security was given, the period for the sale had not arrived is not material. Whenever the property was sold, and the money paid to the executor, he would hold part of it for Charles Lee, or for the person who had obtained an assignment of his share from Charles Lee. Here, Miss Lys first gave to the executor notice of the assignment in her favor, and therefore she has priority over all other assigns of Charles Lee's share as to this part of the mortgaged property.

As regards the residuary real estate, there is no direction in the will to sell that. It was devised to the testator's wife for life, and after her death to her children. That would carry the fee-simple, and the children would not be obliged to take their shares from the hands of any third person, and although by the deed of arrangement they seem to have treated it as personal estate, it was in their own hands; and therefore there can be no question of notice as to this property, but it must go to the incumbrancers according to the order in time in which they obtained their securities.

¹ *Malcolm v. Charlesworth*, 1 Keen, 63; *Jones v. Jones*, 8 Sim. 633; *Wilmot v. Pike*, 5 Hare, 14; *Rochard v. Fulton*, 7 Ir. Eq. R. 131; *Parks v. Innes*, 33 Barb. 37 (*semble*), *accord.* — ED.

² 14 Sim. 76.

PHILLIPS v. PHILLIPS.

IN CHANCERY, BEFORE LORD WESTBURY, C., DECEMBER 9, 10, 1861.

[Reported in 4 De Gex, Fisher, & Jones, 208.]

THE LORD CHANCELLOR.¹ When I reserved my judgment at the conclusion of the argument in this case, it was rather out of respect to that argument than from a feeling of any difficulty with regard to the question that had been so strenuously contested before me.

The case is a very simple one. The plaintiff claims as the grantee of an annuity granted by a deed dated in the month of February, 1820, to issue out of certain lands in the county of Monmouth, secured by powers of distress and entry. The annuity or rent-charge was not to arise until the death of one Rebecca Phillips, who died in the month of December, 1839, and the first payment of the annuity became due on the 8th of March, 1840. The case was argued on both sides on the admitted basis that the legal estate was outstanding in certain incumbrancers, and is still outstanding. Subject to the annuity the grantor was entitled in fee-simple in equity. In February, 1821, the grantor intermarried with one Mary Phillips. On the occasion of that marriage, a settlement, dated in February, 1821, was executed, and under this deed the defendants claim; and claim, therefore, as purchasers for a valuable consideration. No payment has ever been made in respect of the annuity.

The bill was filed within twenty years, and seeks the ordinary relief applicable to the case. The defendants by their answer insist that the deed was voluntary, and therefore void under the Statute of Elizabeth, as against them in their character of purchasers for valuable consideration, and they also insist upon the Statute of Limitations. But in the answer the defence of purchase for valuable consideration without notice is not attempted to be raised.

At the hearing, an affidavit of Mary Phillips and another person was produced, denying the fact of notice of the annuity at the time of the grant and at the time of the creation of the marriage settlement, and the contention at the bar was that the defence of purchase for valuable consideration without notice was available for the defendants, under these circumstances, and ought to be allowed as a bar to the claim by the court. The Vice-Chancellor in his judgment refused to admit the defence of purchase for valuable consideration without notice, and I entirely agree with him in the conclusion that such a defence requires to be pleaded by the answer, more especially where an answer has been put in,

¹ See *supra*, p. 79, n. 1. — Ed.

But I do not mean to rest my decision upon that particular ground because I have permitted the argument to proceed with reference to the general proposition, which was maintained before me with great energy and learning, viz. that the doctrine of a court of equity was this, that it would give no relief whatever to any claimant against a purchaser for valuable consideration without notice. It was urged upon me that authority to this effect was to be found in some recent decisions of this court, and particularly in the case decided at the Rolls of the Attorney-General *v. Wilkins*.¹

I undoubtedly was struck with the novelty and extent of the doctrine that was thus advanced, and in order to deal with the argument it becomes necessary to revert to elementary principles. I take it to be a clear proposition that every conveyance of an equitable interest is an innocent conveyance; that is to say, the grant of a person entitled merely in equity passes only that which he is justly entitled to, and no more. If, therefore, a person seized of an equitable estate (the legal estate being outstanding), makes an assurance by way of mortgage or grants an annuity, and afterwards conveys the whole estate to a purchaser, he can grant to the purchaser that which he has, viz. the estate subject to the mortgage or annuity, and no more. The subsequent grantee takes only that which is left in the grantor. Hence grantees and incumbrancers claiming in equity take and are ranked according to the dates of their securities; and the maxim applies, "*Qui prior est tempore potior est jure*." The first grantee is *potior*; that is, *potentior*. He has a better and superior—because a prior—equity. The first grantee has a right to be paid first, and it is quite immaterial whether the subsequent incumbrancers at the time when they took their securities and paid their money had notice of the first incumbrance or not. These elementary rules are recognized in the case of *Brace v. Duchess of Marlborough*,² and they are further illustrated by the familiar doctrine of the court as to tacking securities. It is well known that if there are three incumbrancers, and the third incumbrancer, at the time of his incumbrance and payment of his money, had no notice of the second incumbrance, then, if the first mortgagee or incumbrancer has the legal estate, and the third pays him off, and takes an assignment of his securities and a conveyance of the legal estate, he is entitled to tack his third mortgage to the first mortgage which he has acquired, and to exclude the intermediate incumbrancer. But this doctrine is limited to the case where the first mortgagee has the legal title; for if the first mortgagee has not the legal title, the third does not by the transfer obtain the legal title, and the third mortgagee by payment off of the first acquires no priority over the second. Now, the defence of a purchaser for valuable consideration is the creature of a

¹ 17 Beav. 285.

² 2 P. Wms. 491.

court of equity, and it can never be used in a manner at variance with the elementary rules which have already been stated. It seems at first to have been used as a shield against the claim in equity of persons having a legal title. *Bassett v. Nosworthy*¹ is, if not the earliest, the best early reported case on the subject. There the plaintiff claimed under a legal title, and this circumstance, together with the maxim which I have referred to, probably gave rise to the notion that this defence was good only against the legal title. But there appear to be three cases in which the use of this defence is most familiar.

First, where an application is made to an auxiliary jurisdiction of the court by the possessor of a legal title, as by an heir-at-law (which was the case in *Bassett v. Nosworthy*,¹ or by a tenant for life for the delivery of title-deeds (which was the case of *Wallwyn v. Lee*,² and the defendant pleads that he is a *bona fide* purchaser for valuable consideration without notice. In such a case the defence is good, and the reason given is that as against a purchaser for valuable consideration without notice the court gives no assistance; that is, no assistance to the legal title. But this rule does not apply where the court exercises a legal jurisdiction concurrently with courts of law. Thus it was decided by Lord Thurlow in *Williams v. Lambe*,³ that the defence could not be pleaded to a bill for dower; and by Sir J. Leach, in *Collins v. Archer*,⁴ that it was no answer to a bill for fines. In those cases the court of equity was not asked to give the plaintiff any equitable as distinguished from legal relief.

The second class of cases is the ordinary one of several purchasers or incumbrancers each claiming in equity, and one who is later and last in time succeeds in obtaining an outstanding legal estate not held upon existing trusts or a judgment, or any other legal advantage the possession of which may be a protection to himself or an embarrassment to other claimants. He will not be deprived of this advantage by a court of equity. To a bill filed against him for this purpose by a prior purchaser or incumbrancer, the defendant may maintain the plea of purchase for valuable consideration without notice; for the principle is, that a court of equity will not disarm a purchaser, that is, will not take from him the shield of any legal advantage. This is the common doctrine of the *tabula in naufragio*.

Thirdly, where there are circumstances that give rise to an equity as distinguished from an equitable estate, — as, for example, an equity to set aside a deed for fraud, or to correct it for mistake, — and the purchaser under the instrument maintains the plea of purchase for valuable consideration without notice, the court will not interfere.

Now these are the three cases in which the defence in question is

¹ Finch, 102; s. c. 2 White & T. L. C. 1.

² 9 Ves. 24.

³ 3 B. C. C. 264.

⁴ 1 Russ. & Mylne, 284.

most commonly found. None of them involve the case that is now before me.

It was indeed said at the bar that the defendants, being in possession, had a legal advantage in respect of the possession, of which they ought not to be deprived. But that is to confound the subject of adjudication with the means of determining it. The possession is the thing which is the subject of controversy, and is to be awarded by the court to one or to the other. But the subject of controversy, and the means of determining the right to that subject are perfectly different. The argument, in fact, amounts to this: "I ought not to be deprived of possession, because I have possession." The purchaser will not be deprived of anything that gives him a legal right to the possession, but the possession itself must not be confounded with the right to it.

The case, therefore, that I have to decide is the ordinary case of a person claiming under an innocent equitable conveyance that interest which existed in the grantor at the time when that conveyance was made. But, as I have already said, that interest was diminished by the estate that had been previously granted to the annuitant, and as there was no ground for pretending that the deed creating the annuity was a voluntary deed, so there is no ground whatever for contending that the estate of the person taking under the subsequent marriage settlement is not to be treated by this court, being an equitable estate, as subject to the antecedent annuity, just as effectually as if the annuity itself had been noticed and excepted out of the operation of the subsequent instrument.

I have no difficulty, therefore, in holding that the plea of purchase for valuable consideration is upon principle not at all applicable to the case before me, even if I could take notice of it as having been rightly and regularly raised.

We next come to examine the authorities upon which the defence relies. Now, undoubtedly, I cannot assent to some observations which I find attributed to the Master of the Rolls in the report of the case of the Attorney-General v. Wilkins;¹ but to the decision of that case, as explained by his Honor in the subsequent case of Colyer v. Finch,² I see no reasonable objection, and the principles that I have here been referring to are fully explained and acted on by the Master of the Rolls in the case of Colyer v. Finch.² It is impossible, therefore, to suppose that he intended to lay down anything in the case of the Attorney-General v. Wilkins,¹ which is at variance with the ordinary rules of the court as I have already explained them, or which could give countenance to the argument that has been raised before me at the bar.

I have consequently no difficulty in holding that the decree of his Honor the Vice-Chancellor is right upon the grounds on which he placed it

¹ 17 Beav. 285.

² 19 Beav. 500.

in the court below, and that also it would have been right if he had considered the grounds which have been urged before me in support of this petition of rehearing. I therefore affirm the decree and dismiss the petition of rehearing; but inasmuch as the plaintiff sues *in forma pauperis*, of course it must be dismissed without costs.¹

¹ *Bracebridge v. Marlborough*, 2 P. Wms. 491; *Daubeny v. Cockburn*, 1 Mer. 626, 638; *Ford v. White*, 16 Beav. 120; *Cave v. Cave*, 15 Ch. D. 639, *accord*.

Penny v. Watts, 2 De G. & Sm. 501 (*semble*); *Bowen v. Evans*, 1 Jo. & Lat. 178, 263, 264 (*semble*), *contra*.

In *Cave v. Cave*, *supra*, Sir Edward Fry, J., referring to the defence of purchase for value without notice, said, p. 646: "That defence, as we all know, has been the subject of a great deal of decision, and it is by no means easy to harmonize the authorities and the opinions expressed upon the subject. Criticisms upon old cases lie many strata deep, and eminent Lord Chancellors have expressed diametrically opposite conclusions upon the same question. The case of *Phillips v. Phillips* is the one which has been principally urged before me, and that, as being the decision of a Lord Chancellor, is binding upon me, notwithstanding the subsequent comments upon it of Lord St. Leonards in his writings."

The rule *qui prior est tempore, potior est jure*, is but another expression of the rule *nemo dare potest, quod non habet*. For as the owner of a trust or other equity by transferring it to the first transferee necessarily parts with all his interest therein, the attempted transfer to the second transferee, having nothing to operate upon, must be wholly nugatory.

The first transferee may, however, be precluded by the doctrine of estoppel from setting up the first transfer, and so be postponed to the second transferee. For example, if the first incumbrancer represents by words or conduct that he has no incumbrance, and the second transferee purchases the property in reliance upon this representation, the first incumbrancer will obviously not be permitted to show the falsity of his representation. On this principle of estoppel, the second purchaser prevailed against the first in the following cases: *Waldron v. Sloper*, 1 Drew. 193; *Rice v. Rice*, 2 Drew. 73; *Perry Herrick v. Atwood*, 2 De G. & J. 21; *Dowle v. Saunders*, 2 H. & M. 242; *Layard v. Maud*, L. R. 4 Eq. 397; *Hunter v. Walters*, L. R. 11 Eq. 292; L. R. 7 Ch. Ap. 75, s. c.; *Worthington v. German*, 16 W. R. 187. See also to the same effect the earlier cases: *Draper v. Borlace*, 2 Vern. 370; *Ibbottson v. Rhodes*, 2 Vern. 554; *Hobs v. Norton*, 1 Ch. Ca. 128; *Watts v. Cresswell*, 3 Eq. Ab. 515, pl. 3; *Mocatta v. Murgatroyd*, 1 P. Wms. 293; *Savage v. Foster*, 9 Mod. 36; *Berrisford v. Milward*, 2 Atk. 49; *Pearson v. Morgan*, 2 Bro. C. C. 388; *Govett v. Richmond*, 7 Sim. 1.

In the following cases, the second purchaser failing to establish the estoppel took subject to the prior equity: *Harper v. Faulder*, 4 Mad. 129; *Evans v. Bicknell*, 6 Ves. 174; *Barnett v. Weston*, 12 Ves. 130; *Mackreth v. Symmons*, 15 Ves. 329, 353; *Farrow v. Reese*, 4 Beav. 18; *Manningford v. Tolman*, 1 Coll. 670; *Allen v. Knight*, 5 Hare, 272; 11 Jur. 527 (H. L.); *Roberts v. Croft*, 2 De G. & J. 1; *Hunt v. Elmes*, 2 D., F. & J. 578; *Cory v. Eyre*, 1 D., J. & S. 149, 167-170; *Shropshire v. Queen*, L. R. 7 H. L. 496. — Ed.

SECTION V.

What Interest in Trust Property passes to the Assignee of a Bankrupt Cestui que Trust.

BRANDON v. ROBINSON.

IN CHANCERY, BEFORE LORD ELDON, C., DECEMBER 18, 1811.

[Reported in 18 Vesey, 429.¹]

THE bill stated that Stephen Goom, by his will, dated the 1st of August, 1808, devised and bequeathed to the defendants Robinson and Davies all his real and personal estates upon trust to sell, and to divide or otherwise apply the produce to the use of all and every his child or children, living at his decease, in equal proportions; deducting from the share of Thomas Goom the sum of £500, which had been advanced to him, and from the share of William Goom what should be due from him to the testator at his decease, — the said sums so to be deducted to be divided equally among the other children; and he declared his will, that the said several legacies, shares, and eventual interests of such of the legatees as at the time of his decease should have attained the age of twenty-one should be considered as vested interests; and, if there should be but one survivor, upon trust to pay and transfer the same unto such only survivor, his or her executors, &c., for his or her own use, subject nevertheless to such directions as after mentioned in respect to the shares or interests of such of the said legatees as were females, and also in respect to the share and interest of the said Thomas Goom; and he directed that the eventual share and interest of his said son Thomas Goom, of and in his estate and effects, or the produce thereof, should be laid out in the public funds or in government securities at interest by and in the names of his said trustees, &c., during his life; and that the dividends, interest, and produce thereof, as the same became due and payable, should be paid by them from time to time into his own proper hands, or on his proper order and receipt, subscribed with his own proper hand, to the intent the same should not be grantable, transferable, or otherwise assignable, by way of anticipation of any unreceived payment or payments thereof, or of any part thereof; and that upon his decease the principal of such share, together with the dividends and interest and produce thereof, should be paid and

¹ 1 Rose, 197, s. c. — Ed.

applied by his trustees or executors, their heirs, executors, &c., unto and amongst such person or persons as in a course of administration would become entitled to any personal estate of his said son Thomas Goom, and as if the same had been personal estate belonging to him, and he had died intestate.

The bill further stated, that after the death of the testator his son Thomas Goom, having attained the age of twenty-one, became a bankrupt. The plaintiff was the surviving assignee under the commission; and the bill prayed an execution of the trusts of the will and an account, that the estates may be sold, and the clear residue ascertained, and that the plaintiff may receive the benefit of such part or share thereof, or of the interest therein, as he shall be entitled to as assignee under the commission.

To this bill the defendants, the trustees, put in a general demurrer.

Mr. Hart and *Mr. Horne*, in support of the demurrer.

The plaintiffs claim the right, as standing in the place of the bankrupt, to an immediate account, and to receive all his share in this property; and the questions are, 1st, Whether the testator, giving his property to trustees in the confidence that they should under certain restrictions pay this proportion of it to his son, had a right to impose such restrictions as would protect the property against the assignees under a commission of bankruptcy against him; 2dly, Whether, if the testator had that right, he has sufficiently exerted it by this will.

The proposition that a testator may limit a personal benefit strictly, excluding any assignee either by actual assignment or by operation of law, cannot now be disputed. He might limit the enjoyment to continue up to a particular period or event, at that period or on that event to be forfeited, or transferred to some other person. The validity of such a restriction was first decided in the case of *Dommett v. Bedford*,¹ establishing that an alienation in this way is a forfeiture as much as actual alienation. That case was followed by the decision in *Shee v. Hale*,² that a condition not to sell, assign, charge, or dispose of, or empower any person to receive, was broken by taking the benefit of an insolvent act. The reasons of the Master of the Rolls for that judgment, though representing the case as stronger than that of the bankrupt, have a close application; viz., the testator's intention to make the annuity personal to his son, and that he was not to have it as a fund of credit.

If the testator has a right so to limit, he may direct the trustees, who are to take the absolute legal interest, to dispose of it from time to time in a particular manner, to pay into the hands of the legatee personally from time to time, and to no other. Such a disposition is not

¹ 3 Ves. 149; 6 T. R. 684; see the note, 3 Ves. 150.

² 13 Ves. 404.

opposed by any principle of law or public policy. The son acquires nothing until each payment becomes due. When he actually receives, and then only, the trust is executed; and the effect of a decision, that the payment is to be made, not to him personally, but to others, who by representation are become at law entitled to his rights, will be making another will for the testator. The trustees can only be called upon to execute the trust in the terms in which the testator has declared it; viz., to pay into his hands, from time to time, upon his receipt alone. He has no right of property whatever, except in what has so got into his hands; but this plaintiff, not content with an annuity for life, which is all the bankrupt was intended to enjoy, seeks an immediate and absolute payment of the fund itself; which is disposed of upon his death as completely and absolutely as if it had been expressly given to his widow and children, or, if he should leave none, to his next of kin.

THE LORD CHANCELLOR. There is an obvious distinction between a disposition to a man, until he becomes bankrupt, and then over, and an attempt to give him property, and to prevent his creditors from obtaining any interest in it though it is his. Can it be contended that, if the bankrupt during his whole life never signed a receipt, the interest during his life would be undisposed of, and would fall into the residue?

Mr. Leach and *Mr. Roupell*, for the plaintiff, gave up the claim to the principal. If the plaintiff has any interest, this demurrer cannot be supported; and upon that the question put by the court is decisive. Can it be contended that the money received as his share before his certificate is not the property of his creditors? That alone disposes of the demurrer. Certainly a gift may be conditional until a particular event, as until the party becomes bankrupt; but this testator has not so limited the terms of his disposition: those cases have therefore no application. This is a general bequest for the life of the son, with a declaration that he shall not have the power of assignment; and the question is, whether that restraint prevents assignment by the operation of the bankrupt laws. How can this be distinguished from the case of a lease with a proviso not to assign without license, which lease, though the lessee could not assign, would pass by the assignment under a commission of bankruptcy against him, *Goring v. Warner*; ¹ as it might be sold by the sheriff under an execution. The voluntary act is restrained, but not the act of law *in invitum*. There is but one exception to the general effect of the assignment in bankruptcy; that is the case of half-pay, which is excepted, as being a purchase by the public of the public duty of an officer.

THE LORD CHANCELLOR (ELDON). There is no doubt that property

¹ 7 Vin. 85.

may be given to a man until he shall become bankrupt.¹ It is equally clear, generally speaking, that if property is given to a man for his life the donor cannot take away the incidents to a life-estate; and, as I have observed, a disposition to a man until he shall become bankrupt, and after his bankruptcy over, is quite different from an attempt to give to him for his life, with a proviso that he shall not sell or alien it. If that condition is so expressed as to amount to a limitation, reducing the interest short of a life-estate, neither the man nor his assignees can have it beyond the period limited.

In the case of *Foley v. Burnell*,² this question afforded much argument. A great variety of clauses and means was adopted by Lord Foley with the view of depriving the creditors of his sons of any resort to their property; but it was argued here, and, as I thought, admitted, that if the property was given to the sons, it must remain subject to the incidents of property, and it could not be preserved from the creditors, unless given to some one else.

So the old way of expressing a trust for a married woman was, that the trustees should pay into her proper hands, and upon her own receipt only; yet this court always said she might dispose of that interest,³ and her assignee would take it; as, if there was a contract, entitling the assignee, this court would compel her to give her own receipt, if that was necessary to enable him to receive it. It was not before *Miss Watson's Case* that these words, "not to be paid by anticipation," &c., were introduced. I believe these were Lord Thurlow's own words, with whom I had much conversation upon it. He did not attempt to take away any power the law gave her, as incident to property, which, being a creature of equity, she could not have at law; but as under the words of the settlement it would have been her's absolutely, so that she could alien, Lord Thurlow endeavored to prevent that by imposing upon the trustees the necessity of paying to her from time to time, and not by anticipation; reasoning thus, that equity, making her the owner of it, and enabling her, as a married woman, to alien, might limit her power over it: but the case of a disposition to a man, who, if he has the property, has the power of aliening, is quite different.

This is a singular trust. If upon these words it can be established

¹ *Manning v. Chambers*, 1 De G. & Sm. 282; *Sharp v. Cosserat*, 20 Beav. 470; *Rochford v. Hackman*, 9 Hare, 475; *Hatton v. May*, 3 Ch. D. 148; *Nichols v. Eaton*, 91 U. S. 716; *Bramhall v. Ferris*, 14 N. Y. 41; *Tillinghast v. Bradford*, 5 R. I. 205; *Heath v. Bishop*, 4 Rich. Eq. 46, *accord*.

Conf. Davidson v. Chalmers, 33 Beav. 653 (but see *State Bank v. Forney*, 2 Ired. Eq. 181).

See also *Re Jones's Will*, 23 L. T. Rep. 211. — Ed.

² 1 Bro. C. C. 274.

³ *Pybus v. Smith*, 1 Ves. Jr. 189; 3 Bro. C. C. 340. See the notes, 1 Ves. Jr. 194; 5 Ves. 17.

that he had no interest, until he tenders himself personally to the trustees to give a receipt, then it was not his property until then; but if personal receipt is in the construction of this court a necessary act, it is very difficult to maintain that if the bankrupt would not give a receipt during his life, and an arrear of interest accrued during his whole life, it would not be assets for his debts. It clearly would be so.

Next, is there in this will enough to show that, as this interest is not assignable by way of anticipation of any unreceived payment, therefore it cannot be assigned and transferred under the commission of bankruptcy? To prevent that it must be given to some one else; and unless it can be established that this by implication amounts to a limitation, giving this interest to the residuary legatee, it is an equitable interest, capable of being parted with. The principal, at the death of the bankrupt, will be under quite different circumstances. The testator had a right to limit his interest to his life; giving the principal to such person as may be his next of kin at his death, to take it as the personal estate, not of the son, but of him the testator, — as if it was the son's personal estate, but as the gift of the testator.

The demurrer must, upon the whole, be overruled.¹

¹ *Graves v. Dolphin*, 1 Sim. 66; *Green v. Spicer*, 1 Russ. & M. 395; *Piercy v. Roberts*, 1 M. & K. 4; *Snowdon v. Dales*, 6 Sim. 524; *Rippon v. Norton*, 2 Beav. 63; *Page v. Way*, 3 Beav. 20; *Lord v. Bunn*, 2 Y. & C. C. C. 98; *Kearsley v. Woodcock*, 3 Hare, 185; *Rochford v. Hackman*, 9 Hare, 475, 480 (*semble*); *Wallace v. Anderson*, 16 Beav. 533; *Sanford v. Lackland*, 2 Dill. 6 (*semble*); *Rugely v. Robinson*, 10 Ala. 702; *Robertson v. Johnston*, 36 Ala. 197; *Smith v. Moore*, 37 Ala. 327; *McIlvaine v. Smith*, 42 Mo. 45; *Dick v. Pitchford*, 1 Dev. & B. Eq. 480; *Hallett v. Thompson*, 5 Paige, 583; *Bryan v. Knickerbacker*, 1 Barb. Ch. 409; *Havens v. Healy*, 15 Barb. 296; *Tillinghast v. Bradford*, 5 R. I. 205; *Heath v. Bishop*, 4 Rich. Eq. 46; *Wylie v. White*, 10 Rich. Eq. 294; *Nickell v. Handly*, 10 Grat. 336 (*semble*), *accord*.

Nichols v. Eaton, 91 U. S. 711 (*semble*); (but see *Nichols v. Levy*, 5 Wall. 433, 441); *Spindle v. Shreve*, 4 Fed. Rep. 136; *Pope v. Elliott*, 8 B. Mon. 56 (*semble*); *Braman v. Stiles*, 2 Pick. 460 (*semble*); (but see *Palmer v. Stevens*, 15 Gray, 343, 345); *Fisher v. Taylor*, 2 Rawle, 33; *Vaux v. Parke*, 7 Watts & S. 19; *Norris v. Johnston*, 5 Barr, 287; *Eyrick v. Hetrick*, 13 Pa. 488; *Shankland's Appeal*, 47 Pa. 113 (*semble*); *Rife v. Geyer*, 59 Pa. 393 (*semble*); *Keyser v. Mitchell*, 67 Pa. 473; *White v. White*, 30 Vt. 338 (*semble*), *contra*.

See also *Graff v. Bonnett*, 31 N. Y. 9; *Genet v. Beekman*, 45 Barb. 382; *Locke v. Mabbett*, 3 Abb. App. 68; *Wetmore v. Truslow*, 51 N. Y. 338, — which were decided under New York statutes; and *conf. Easterly v. Keney*, 36 Conn. 18.

In *Nichols v. Eaton*, *supra*, Mr. Justice Miller, who delivered the opinion of the court, said, p. 725: "But, while we have thus attempted to show that Mrs. Eaton's will is valid in all its parts upon the extremest doctrine of the English Chancery Court, we do not wish to have it understood that we accept the limitations which that court has placed upon the power of testamentary disposition of property by its owner. We do not see, as implied in the remark of Lord Eldon, that the power of alienation is a necessary incident to a life-estate in real property, or that the rents and profits of real property and the interest and dividends of personal property may not be enjoyed by an individual without liability for his debts being attached as a necessary incident to such

enjoyment. This doctrine is one which the English Chancery Court has ingrafted upon the common law for the benefit of creditors, and is comparatively of modern origin. We concede that there are limitations which public policy or general statutes impose upon all dispositions of property, such as those designed to prevent perpetuities and accumulations of real estate in corporations and ecclesiastical bodies. We also admit that there is a just and sound policy peculiarly appropriate to the jurisdiction of courts of equity to protect creditors against frauds upon their rights, whether they be actual or constructive frauds. But the doctrine, that the owner of property, in the free exercise of his will in disposing of it, cannot so dispose of it, but that the object of his bounty, who parts with nothing in return, must hold it subject to the debts due his creditors, though that may soon deprive him of all the benefits sought to be conferred by the testator's affection or generosity, is one which we are not prepared to announce as the doctrine of this court.

"If the doctrine is to be sustained at all it must rest exclusively on the rights of creditors. Whatever may be the extent of those rights in England, the policy of the States of this Union, as expressed both by their statutes and the decisions of their courts, has not been carried so far in that direction.

"It is believed that every State in the Union has passed statutes by which a part of the property of the debtor is exempt from seizure on execution or other process of the courts ; in short, is not by law liable to the payment of his debts. This exemption varies in its extent and nature in the different States. In some it extends only to the merest implements of household necessity ; in others it includes the library of the professional man, however extensive, and the tools of the mechanic ; and in many it embraces the homestead in which the family resides. This has come to be considered in this country as a wise, as it certainly may be called a settled, policy in all the States. To property so exempted the creditor has no right to look, and does not look, as a means of payment when his debt is created ; and while this court has steadily held, under the constitutional provision against impairing the obligations of contracts by State laws, that such exemption laws, when first enacted, were invalid as to debts then in existence, it has always held, that, as to contracts made thereafter, the exemptions were valid.

"This distinction is well founded in the sound and unanswerable reason, that the creditor is neither defrauded nor injured by the application of the law to his case, as he knows, when he parts with the consideration of his debt, that the property so exempt can never be made liable to its payment. Nothing is withdrawn from this liability which was ever subject to it, or to which he had a right to look for its discharge in payment. The analogy of this principle to the devise of the income from real and personal property for life seems perfect. In this country, all wills or other instruments creating such trust-estates are recorded in public offices, where they may be inspected by every one ; and the law in such cases imputes notice to all persons concerned of all the facts which they might know by the inspection. When, therefore, it appears by the record of a will that the devisee holds this life-estate or income, dividends, or rents of real or personal property, payable to him alone, to the exclusion of the alienee or creditor, the latter knows that, in creating a debt with such person, he has no right to look to that income as a means of discharging it. He is neither misled nor defrauded when the object of the testator is carried out by excluding him from any benefit of such a devise.

"Nor do we see any reason, in the recognized nature and tenure of property and its transfer by will, why a testator who gives, who gives without any pecuniary return, who gets nothing of property value from the donee, may not attach to that gift the incident of continued use, of uninterrupted benefit of the gift, during the life of the donee. Why a parent, or one who loves another, and wishes to use his own property

YOUNGHUSBAND v. GISBORNE.

IN CHANCERY, BEFORE SIR J. L. KNIGHT BRUCE, V. C., AUGUST 7,
1844.

[*Reported in 1 Collyer, Chancery Cases, 400.*]

FRANCIS DUCKENFIELD, by his will, dated the 17th June, 1823, gave certain real estates to trustees, upon trust to levy and raise yearly, during the life of his brother John William Astley, one annuity or yearly sum of £400; and, in case of his death in the interval between any of the days therein mentioned for payment thereof, then a proportional part thereof up to the time of death. And he directed that the annuity and proportional part aforesaid should be held by his said trustees, upon trust for the personal support, clothing, and maintenance of his said brother, so as not to be subject or liable to the claims of any person or persons to whom he should attempt to charge, anticipate, or otherwise incur the same, nor to his creditors under a commission of bankruptcy or any act for the relief of insolvent debtors, or to his own control, contracts, debts, or other engagements. And the testator declared that the said annuity should be paid to his said brother himself from time to time, when and after the same should become due, until he should attempt to charge, anticipate, or otherwise incur the same, or until any other person or persons might claim the same; and from and after such attempt or claim, the same should be applied by his said trustees, or some person under their direction, for or towards the personal support, clothing, and maintenance of his said brother, and for no other purpose whatsoever.

The testator died in July, 1835, and the trustees duly paid the annuity to John William Astley up to the 25th December, 1841.

On the 31st of May, 1842, John William Astley took the benefit of

in securing the object of his affection, as far as property can do it, from the ills of life, the vicissitudes of fortune, and even his own improvidence or incapacity for self-protection, should not be permitted to do so, is not readily perceived."

On the other hand, the same court, speaking through Mr. Justice Swayne, said, in *Nichols v. Levy*, *supra*, p. 441: "If the determination of this case depended upon the general principles of jurisprudence, the result must necessarily be in favor of the appellees. It is a settled rule of law that the beneficial interest of the *cestui que trust*, whatever it may be, is liable for the payment of his debts. It cannot be so fenced about by inhibitions and restrictions as to secure to it the inconsistent characteristics of right and enjoyment to the beneficiary and immunity from his creditors. A condition precedent that the provision shall not vest until his debts are paid, and a condition subsequent that it shall be divested and forfeited by his insolvency, with a limitation over to another person, are valid, and the law will give them full effect. Beyond this, protection from the claims of creditors is not allowed to go." — ED.

the Insolvent Debtors' Act, and the plaintiffs, as his assignees, instituted this suit for the purpose of obtaining the annuity.

Mr. Wigram and *Mr. Hallett*, for the plaintiff, mentioned *Lord v. Bunn*.¹

Mr. Beales, for the insolvent, contended that this was a mere personal trust for him, and not being either an absolute interest or an interest for life, did not pass to the assignees. He cited *Twopeny v. Peyton*² and *Godden v. Crowhurst*.³ [THE VICE-CHANCELLOR. If I create a trust for the maintenance and clothing of a male adult of sound mind, is it anything more than a general trust for his benefit?]

Mr. James Parker and *Mr. Colville*, for the trustees.

In the course of the argument, the Vice-Chancellor noticed that in *Twopeny v. Peyton* the gift was to a man who, at the time of the gift, was bankrupt and insane.

THE VICE-CHANCELLOR. I wish to be understood as not giving any opinion, whether the two cases cited by *Mr. Beales* are or are not materially distinguishable from the present. If they are not so, then I must respectfully dissent from them. In the present case I must say that I have no doubt. There is no clause of forfeiture, no clause of cesser, no limitation over. It is merely a wordy trust for the benefit of the insolvent, attempted to be guarded from alienation, but vainly and ineffectually.

Considering the language of the will and the state of the authorities, I think it reasonable that the costs should be paid out of the fund.⁴

In re BARR'S TRUSTS.

IN CHANCERY, BEFORE SIR W. PAGE WOOD, MARCH 6, 29, 31, 1858.

[Reported in 4 *Kay & Johnston*, 219.]

VICE-CHANCELLOR SIR W. PAGE WOOD.⁵ The sole question in this case is, whether the assignees in bankruptcy of a person who became bankrupt in the year 1810 are to be preferred to an assignee for value claiming under an assignment executed to him by the bankrupt in 1818, and of which notice was immediately given to the trustees of the property in question, the assignees in bankruptcy not having given any such notice to the trustees.

It was argued, on behalf of the assignees in bankruptcy, that although it was determined by Lord St. Leonards in *Re Atkinson*⁶ that

¹ 2 Y. & C. C. 98.

² 10 Sim. 487.

³ 10 Sim. 642.

⁴ *Twopeny v. Peyton*, 10 Sim. 487, *contra*. — ED.

⁵ See *supra*, p. 79, n. 1. — ED.

⁶ 2 D., M. & G. 140.

an assignee in insolvency merely stands in the place of the insolvent, and takes only such interest as he can give, and subject to all equities by which the insolvent is bound, so that, if he fails to give notice to trustees of an equitable interest like the present, he will be postponed to a subsequent assignee for value who has taken that precaution; yet there is a difference in the present case in respect of the very powerful effect of the statutes by which the law of bankruptcy was regulated in the year 1810, when this bankruptcy took place, those statutes giving to assignees in bankruptcy rights and interests which, it was contended, are of a far higher order than those given by the Act for the Relief of Insolvent Debtors,¹—the act in question before Lord St. Leonards.

A similar contest was raised in the case of *Mitford v. Mitford*, before Sir William Grant.² There assignees in bankruptcy claimed, as against the widow of a bankrupt, a legacy of stock to which she, or the bankrupt in her right, was entitled during the coverture, and to which she claimed to be entitled absolutely as having survived her husband; and there it was strongly argued on behalf of the assignees, that, by virtue of the acts with reference to bankruptcy, the effect of the assignment under a commission was so powerful that it vested in the assignees in bankruptcy every description of property which the bankrupt could have reduced into possession or assigned for valuable consideration to a *bona fide* purchaser,—in fact, that it was equivalent to a reduction into possession, which would apply here, because the doctrine in *Dearle v. Hall* is this, that, where there is an equitable assignment of a chose in action, everything must be done by the assignee that can be done by him towards approaching to possession, and one step towards such possession is to give notice to the trustees. That was the argument before Sir William Grant in the case of *Mitford v. Mitford*; but the way in which he dealt with it was this: Taking a view, which agrees exactly with that of Lord St. Leonards with reference to the assignee in insolvency, he says, “I have always understood that the assignment from the commissioners, like any other assignment by operation of law, passed the rights of the bankrupt precisely in the same plight and condition as he possessed them. Even where a complete legal title vests in them, and there is no notice of any equity affecting it, they take subject to whatever equity the bankrupt was liable to. . . . In *Worrall v. Marlar*,³ Lord Thurlow says, a court of equity has much greater consideration for an assignment actually made by contract than for an assignment by mere operation of law; for, as to the latter, when the equitable interest of the wife was transferred to the creditor of the husband by mere operation of law, he stood exactly in the place of the husband, and was subject precisely to the same equity with respect to

¹ 7 Geo IV. c. 57.² 9 Ves. 87.³ 1 P. Wms. 459, n.

the wife ; and accordingly, though it has been much agitated, and is not yet, perhaps, perfectly determined whether a particular assignee be liable to make a provision for the wife out of her fortune, it has been long settled that assignees under a commission of bankruptcy, coming into a court of equity to reduce the interest of the wife into possession, are bound to make such a settlement as the husband would in the same case have been compelled to make ; but if the assignment has the effect of reducing the wife's interest into possession" (the argument in that case had been that the assignment had that effect), "how could this equity ever have prevailed? Out of that of which the husband has obtained possession no settlement can be compelled. If the assignment, therefore, put the assignees in possession, it would completely extinguish all the claims of the wife, as the possession of the husband himself certainly does. They ought, on that principle, to be considered as coming here to claim what had by the assignment ceased to be a trust for the wife, and become wholly a trust for the creditors. But the court considers the assignment as doing nothing more than to place the assignees in the room of the husband." He therefore held, that, by the bankrupt law as it then existed, the assignment of the commissioners in bankruptcy had no such effect as was there contended for on behalf of the assignees. The assignees simply represented the husband. They could not reduce the property into possession without the assistance of the court, any more than the husband could have done so ; and coming here for that assistance, the court imposed on them the condition on which alone it would have assisted the husband to obtain the possession.

Now, that corresponds precisely with the observations of Lord St. Leonards in *Re Atkinson*,¹ where he says : "It may be considered as decided that the assignee in insolvency represents the insolvent ; he stands in his place, and takes only such interest as he can give, and subject to all equities by which the insolvent is bound. It has, however, been contended that the effect of the act is, so to vest the property that the insolvent cannot afterwards divest it. But this is not so, for there are no words in the act giving to the assignee any higher interest than the insolvent himself has. The assignee does not, therefore, take so as not to be subject to equities as administered in this court." In fact, taking the same view with respect to the Act for the Relief of Insolvent Debtors as that taken by Sir William Grant (in reference to a different branch of equity as administered in this court), with respect to the acts which then regulated the law of bankruptcy, viz. that assignees under a commission stand in no higher position than the bankrupt himself, and must be subject to all the rules by which equitable rights are administered in this court.

¹ 2 D., M. & G. 143.

The Act for the Relief of Insolvent Debtors,¹ upon which Lord St. Leonards was then reasoning, appears to me to be quite as strong in reference to this question as the acts by which the law of bankruptcy was regulated when this bankruptcy occurred. It comprises all the property of the insolvent in the largest terms. By the eleventh section, the insolvent, at the time of subscribing his petition, is to execute a conveyance and assignment of all his estate, right, title, interest, and trust in and to all his real and personal estate and effects, both within this realm and abroad (except his wearing apparel and the other things excepted, not exceeding the value of £20), and of all his future estate, right, title, interest, and trust in or to any real or personal estate and effects, within this realm or abroad, which he may purchase, or which may revert, descend, be devised or bequeathed, or come to him. And such conveyance and assignment shall vest all his real and personal estate and effects, and all such future real and personal effects as there mentioned, of every nature and kind whatsoever, and all such debts as there mentioned, in the provisional assignee; with a proviso making the assignment void in case the petition shall be dismissed.² So that, in truth, the whole of the property of the insolvent is vested, in the largest words, in the assignee in insolvency. Nor is it possible, as it appears to me, to give to those words any other effect than to the words occurring in the acts now in question with reference to the law of bankruptcy, or to draw any distinction for the present purpose between the two enactments. And as to the argument which was advanced on behalf of the present assignees, that in insolvency the assignment is voluntary, whereas in bankruptcy the proceedings are *in invitum*, I cannot for a moment attach any weight to that distinction.

The reasoning of the Master of the Rolls in *Dearle v. Hall* applies as fully and forcibly to an assignee in bankruptcy as to an assignee for valuable consideration. "If," he says, "you are willing to trust the personal credit of the man, and are satisfied that he will make no improper use of the possession in which you allow him to remain, notice is not necessary, for against him the title is perfect without notice." This, I may observe in passing, explains what Lord Justice Turner says in *Bartlett v. Bartlett*,³ in reference to *Ex parte Newton*,⁴ that, in that case, the court of bankruptcy appears to have proceeded on a mistaken supposition that the assignment to the bankrupt passed nothing without notice to the trustee. "But if he, availing himself of the possession as a means of obtaining credit, induces third persons to purchase from him as the actual owner, and they part with their money before your pocket conveyance is notified to them, you must be postponed. In being postponed, your security is not invalidated; you had

¹ 7 Geo. IV. c. 57.

² 7 Geo. IV. c. 57, § 11.

³ 1 De G. & J. 143.

⁴ 4 D. & C. 138.

priority, but that priority has not been followed up; and you have permitted another to obtain a better title to the legal possession. What was done by Dearle and Sherring did not exhaust the thing (to borrow the principle of the civil law), but left it open to traffic. These are the principles on which I think it to be very old law that possession, or what is tantamount to possession, is the criterion of perfect title to personal chattels, and that he who does not obtain such possession must take his chance."¹ Now, it is settled that a mere assignment of an equitable interest is not tantamount to possession; and that what is necessary to give to the assignee of an equitable interest a right tantamount to possession, is notice of the assignment.

I will now advert to the second point contended for on behalf of the assignees, viz., that, if notice were necessary, the commission of bankruptcy was notice to all the world. Now, as to this particular case, the point is settled by the decision in *Sowerby v. Brooks*.² There a debt due to a bankrupt before his bankruptcy was paid to the bankrupt himself after the issuing of the commission, but before the party paying had any actual knowledge of the bankruptcy. The question was, whether the issuing of the commission was, in law, to be deemed notice to a debtor so paying his debt; and the judges determined that it was not. They were of opinion that, in the case before them, the issuing of the commission was not notice in point of law.³ And clearly it must follow, upon the same principle, that if the trustees in the case now before me had paid the fund in question to the petitioner, without actual knowledge of the bankruptcy, they would have been protected by the decision in *Sowerby v. Brooks*.

This brings me to the third question raised on behalf of the assignees, viz. whether the trustees had actual knowledge or notice of the bankruptcy.⁴

I therefore hold that the title is in the petitioners claiming under the assignee for value by virtue of the indenture of 1818; and the order will be according to the prayer of the petition.

*Ordered accordingly.*⁵

¹ 3 Russ. 24.

² 4 B. & Ald. 523.

³ 4 B. & Ald. 534.

⁴ The learned judge's examination of the evidence on this point is omitted. His conclusion was that the trustees did not have actual knowledge or notice of the bankruptcy. — Ed.

⁵ *Smith v. Smith*, 2 Cr. & M. 231 (*semble*); *Re Atkinson*, 2 D., M. & G. 140; *Re Brown's Trusts*, L. R. 5 Eq. 88; *Lloyd v. Banks*, L. R. 3 Ch. Ap. 488 (*semble*); *Re Russell's Policy*, L. R. 15 Eq. 26, *accord*.

In *Bartlett v. Bartlett*, 1 De G. & J. 127; *Re Webb's Policy*, 15 W. R. 529, it was decided that an assignment in bankruptcy would prevail over a prior assignment of a chose in action or equitable interest, if at the time of the bankruptcy no notice of the prior assignment had been given to the debtor or trustee. But these decisions have been qualified, and it is now understood that the subsequent assignee in bankruptcy

will not be preferred unless his notice to the debtor or trustee precedes that of the first assignee. *Stuart v. Cockerell*, L. R. 8 Eq. 607; *Official Liquidators v. Carter*, 20 W. R. 354.

In the United States the assignee in bankruptcy acquires only the interest of the bankrupt. If, therefore, the bankrupt has made an assignment before bankruptcy, the prior assignee will be preferred to the assignee in bankruptcy irrespective of any question of notice. *Blouin v. Hart*, 30 La. An. 714; *Dickinson v. Central Bank* (Mass. 1880), 23 Alb. L. J. 76. But see *contra*, *Shipman v. Ætna Bank*, 29 Conn. 245.

Under the Bankruptcy Act, 1849, § 141, the assignee in bankruptcy is preferred to a subsequent assignee regardless of the question of notice. *Re Coombes*, 1 Giff. 91; *Bright's Trusts*, 13 Ch. D. 413. — ED.

W. B. DURANT v. MASSACHUSETTS HOSPITAL LIFE
INSURANCE COMPANY.

IN THE DISTRICT COURT OF THE UNITED STATES, DISTRICT OF MASSACHUSETTS, MAY, 1877.

[*Reported in 2 Lowell, 575.*]

BANKRUPTCY. Income in trust for bankrupt and his wife and children. This was a bill in equity, filed by the assignee in bankruptcy of the estate of S. K. Williams the younger, asking that a certain annuity, or some part of it, might be decreed to belong to the complainant, as such assignee. In 1873, S. K. Williams, of Boston, deposited \$10,000 with the defendant company, upon trusts, declared as follows: "The said company shall and will, yearly and every year during the natural life of Samuel K. Williams, Jr. (son of said Samuel K. Williams), and after his decease during the natural life of his wife Lucy Williams, if she should survive him, the income to be applied to the support of said Samuel K., Jr., and of his said wife Lucy, and the education and support of their children, of Cambridge, in the State of Massachusetts, pay or cause to be paid to the said Samuel K. Williams, Jr., or to his said wife Lucy, in the order and for the purposes above stated, in yearly payments, on the first days of January in each and every year, during the natural lives of the said Samuel K., Jr., and of his wife Lucy, upon his or her separate order and receipt, to be dated on or subsequent to the several days on which the said several payments shall fall due; which annuity and principal sum are both hereby declared to be inalienable by the respective grantees thereof, and not subject to their debts or control, the first payment to be made on the first day of January next, the same rate of interest as the said company shall actually make and receive upon their capital stock," &c.; with careful stipulations concerning the management, and other terms, not affecting the question raised in this case; and they agreed that after the death of S. K. Williams, Jr., and his wife, they would pay the principal to the executors or administrators of the father, to be by them distributed among all his grandchildren.

Mr. Williams the elder made a similar deposit for each of his seven children, and died in 1874, leaving a will, by which a large estate was devised in trust for his children and grandchildren, with full discretion to his trustees as to the mode of applying the income for the benefit of the persons intended to be benefited thereby.

In June, 1876, S. K. Williams, the son, became bankrupt; and the complainant was appointed assignee of his estate, and brought this

bill, asking the court to declare him entitled to the annuity, or to so much thereof as should be found not necessary for the purposes named. The bankrupt has a wife and seven children.

W. B. Durant, pro se.

H. C. Hutchins and *E. W. Hutchins*, for the defendants.¹

LOWELL, J. How far the law of this country generally, or of Massachusetts in particular, conforms to the doctrine of *Brandon v. Robinson*, I do not care to consider. The question is at this time before the Supreme Judicial Court of the State, if I am rightly informed, and is likely to be settled in due course; but I consider this case to be governed by *Nichols v. Eaton*.²

The annuity given to the bankrupt was given him in trust for the uses set forth in the contract with the defendant company. It was argued that those words were the expression of a motive, or a wish, on the part of the donor; but they are the language of command, and there is nothing precatory about them. The payments are to be made to the bankrupt, and after his death to his wife, "the income thereof to be applied to the support of said Samuel K., Jr., and of his said wife, and the education and support of their children;" and again, the company agree to pay the income to the bankrupt or his wife, "in the order and for the purposes aforesaid." No doubt his receipt is a discharge, and the company take care not to be responsible for the application of the money; but that application is ordered, and the wife and children, or any of them, could maintain a bill against the bankrupt for its enforcement. *Whiting v. Whiting*; ³ *Chase v. Chase*; ⁴ *Loring v. Loring*; ⁵ *Cole v. Littlefield*; ⁶ *Wright v. Miller*; ⁷ *Lucas v. Lockhart*.⁸ The point is well put by Mr. Perry, in his excellent work on Trusts, § 117, that the question to be decided is, whether the settlor intended to impose an obligation, or only to assign the motive for an absolute gift. And I say again, the language is not at all doubtful here; the son, in the first instance, and his widow, if she should survive him, are to take this income and apply it to the purposes mentioned. I agree with a note of Mr. Perry's to the same section, that the tendency of the latter cases is to seek, somewhat less astutely than formerly, to discover trusts in precatory words; but in no case, late or early, that I have seen, are words like those in this case treated as precatory.

A doubt was suggested in argument whether a trust could be grafted on a trust. Some inconveniences in the working of such a sub-trust were mentioned in a Massachusetts case, — *Rich v. Rogers*; ⁹ but the court, in the later case of *Chase v. Chase*,⁴ found them not insuperable.

¹ The arguments of counsel are omitted. — Ed.

² 4 Gray, 236.

³ 2 Allen, 101.

⁵ 35 Me. 439.

⁷ 8 N. Y. 9.

⁹ 14 Gray, 174.

² 91 U. S. 716.

⁵ 100 Mass. 340.

⁸ 10 Sm. & M. 466.

And in all the cases above cited, in which an annuitant or life-tenant has been held to be a trustee, the *corpus* of the property was already in trust, and he was only a sub-trustee, as he is called in *Chase v. Chase*, *ubi supra*.

Nor is there any difference between a settlement *inter vivos* and a will, in the creation of a trust, excepting that a greater latitude of construction is allowed in ascertaining the intent of a testator, who is supposed to labor under some disadvantages for expressing his meaning, as compared with one who is drawing up a marriage settlement, or entering into one of the more deliberate transactions of life. As there is no obscurity in the language of this instrument, the difference is unimportant.

Then the question remains: What interest have the creditors of S. K. Williams, Jr., in this annuity? It was conceded at the argument, and is the law, that whatever Williams could have assigned, or his creditors could have reached by any proceedings in equity, can be made available by his assignee for the payment of his debts. There are cases in which the courts have inferred from the terms of the settlement, or from the situation of the parties, that the beneficiaries were to take equal shares, *per capita*. One of the earliest of these cases is *Rippon v. Norton*; ¹ but the propriety of the decree in that case was questioned in *Wallace v. Anderson*; ² and such an artificial mode of division could not have been contemplated, and would not be just, in the existing circumstances of this family. There are other cases in which an inquiry has been ordered before a Master into the necessities of the wife and children, with an intimation that whatever was not wanted for their support and education would belong to the assignee.³ Where, however, the trustees have a discretion by which they may deprive the debtor of income altogether, I understand the modern doctrine in England to be that the assignee in bankruptcy will take only what, if anything, the trustees actually appropriate to the debtor ⁴ *Lord v. Bunn*; ⁵ *Kearsley v. Woodcock*; ⁶ *Trappes v. Meredith*.⁷

In England, the assignees in bankruptcy formerly acquired all the

¹ 2 Beav. 63.

² 16 Beav. 533.

³ *Page v. Way*, 3 Beav. 20; *Kearsley v. Woodcock*, 3 Hare, 185; *Wallace v. Anderson*, 16 Beav. 533; *Rugely v. Robinson*, 10 Ala. 702; *Wylie v. White*, 10 Rich. Eq. 294, *accord*.

Godden v. Crowhurst, 10 Sim. 642; *Hill v. McRae*, 27 Ala. 175; *Holdship v. Patterson*, 7 Watts, 547; *White v. White*, 30 Vt. 338; *Michell v. Handly*, 10 Grat. 336; *Johnston v. Zane*, 11 Grat. 570, *contra*. — Ed.

⁴ *Lord v. Bunn*, 2 Y. & C. C. C. 98; *Holmes v. Penney*, 3 K. & J. 90; *Re Landon's Will*, W. N. (1871), 52; *Nichols v. Eaton*, 91 U. S. 716, *accord*. — Ed.

⁵ 2 Y. & Coll. 98.

⁶ 3 Hare, 185.

⁷ L. R. 10 Eq. 604; reversed on another point, L. R. 7 Ch. 248.

debtor's property, present and future, until his discharge; and even now they take it until his discharge, or the close of the proceedings in bankruptcy, whichever event may first occur; and by the insolvent law, under which some of the decisions were made, his person only was discharged, and the assignees took the whole property, until the debts were fully paid. Under this system it was possible for a court of equity to shape its decrees from time to time to meet events as they occurred. If, for example, the children died or were emancipated, and the trusts as to them were accomplished, it could decree a larger amount to the assignee; and, if more children were born, might vary the decree in an opposite sense. But the assignee under our bankrupt law takes at once whatever interest is assignable, and must sell it promptly in his turn; and what I have to decide is, whether I can decree that any specific part of this annuity has come into his hands to be disposed of in that way.

In principle and reasoning, this case, as I have already said, is governed by *Nichols v. Eaton*.¹ There the trustees had a full discretion how to dispose of the income; and it was held that the assignee took nothing. I think the debtor in this case has such a discretion, from the very necessity of the case. The trust does not depend upon the person of the trustee; and I am inclined to think that the Supreme Judicial Court would have power to appoint some other person to receive this income, if it were shown that by reason of his insolvency and its consequences, or for any other reason, the debtor had become unfit to fill the office of trustee; and I think such a new trustee would have a full discretion in the appropriation of the income.

If this is not so, but the bankrupt is entitled to some part of this income, yet I think it impossible for any court to say what that part is; for the reason that it may be a constantly varying quantity, and that it would be both impracticable and unjust for me to undertake to decree to the assignee an interest for the life of the bankrupt in any such aliquot part. It is plain that if I cannot do that, I cannot give him anything which will be of value to the creditors. No doubt this amounts to saying that the bankrupt will have some benefit from the trust; but this is the actual result of the English decisions concerning discretionary trusts, which is approved and followed in *Nichols v. Eaton*, *ubi supra*. This effect is pointed out by Mr. Robson, in his work on Bankruptcy (3d ed.), p. 396; and I do not see how a court can prevent it.

The case is a hard one for the creditors; and I shall be willing to hear the parties further on the question of costs, which was but very briefly touched upon in the argument.

Bill dismissed (question of costs reserved).

SECTION VI.

What Interest in Trust Property can be reached by a Creditor of the Cestui que Trust.

STATUTE 29 CHARLES II., CHAPTER 3, SECTIONS 10 and 11, 1676.

[8 *Statutes at Large*, 407.]

§ 10. And be it further enacted by the authority aforesaid, That from and after the said four and twentieth day of June it shall and may be lawful for every sheriff or other officer to whom any writ or precept is or shall be directed, at the suit of any person or persons, of, for, and upon any judgment, statute, or recognizance hereafter to be made or had, to do, make, and deliver execution unto the party in that behalf suing, of all such lands, tenements, rectories, tithes, rents, and hereditaments as any other person or persons be in any manner of wise seised or possessed, or hereafter shall be seised or possessed, in trust for him against whom execution is so sued, like as the sheriff or other officer might or ought to have done, if the said party against whom execution hereafter shall be so sued, had been seised of such lands, tenements, rectories, tithes, rents, or other hereditaments of such estate as they be seised of in trust for him at the time of the said execution sued ; (2) which lands, tenements, rectories, tithes, rents, and other hereditaments, by force and virtue of such execution, shall accordingly be held and enjoyed, freed and discharged from all incumbrances of such person or persons as shall be so seised or possessed in trust for the person against whom such execution shall be sued ; (3) and if any *cestui que trust* hereafter shall die, leaving a trust in fee-simple to descend to his heir, there and in every such case such trust shall be deemed and taken, and is hereby declared to be assets by descent, and the heir shall be liable to and chargeable with the obligation of his ancestors for and by reason of such assets, as fully and amply as he might or ought to have been, if the estate in law had descended to him in possession in like manner as the trust descended ; any law, custom, or usage to the contrary in any wise notwithstanding.

§ 11. Provided always, That no heir that shall become chargeable by reason of any estate or trust made assets in his hands by this law, shall by reason of any kind of plea or concession of the action, or suffering judgment by *nient dedire*, or any other matter, be chargeable to pay the condemnation out of his own estate ; (2) but execution shall be sued of the whole estate so made assets in his hands by descent, in whose hands soever it shall come after the writ purchased, in the same manner as it is to be at and by the common law, where the heir-at-law pleading a true plea, judgment is prayed against him thereupon ; anything in this present act contained to the contrary notwithstanding.

SHIRLEY v. WATTS.

IN CHANCERY, BEFORE WILLIAM FORTESCUE, ESQ., M. R., NOVEMBER 23, 1744.

[Reported in 3 *Atkyns*, 200.]

A JUDGMENT creditor who has not taken out execution brings a bill against the defendant to redeem him, who is a mortgagee of the leasehold estate, and likewise a bond creditor.

MASTER OF THE ROLLS. The case of *Angel v. Draper*¹ is in point, and a stronger one than the present, for there the defendant who had the goods in his hands seemed to have come to the possession of them in a fraudulent manner; but notwithstanding upon defendant's demurring, because the plaintiff (a judgment creditor) had not alleged he had taken out execution, the court allowed the demurrer, and said the plaintiff ought actually to have sued out execution before he had brought his bill.

In the present case there is not the least suggestion of fraud, the defendant being a fair and *bona fide* creditor by mortgage.

There was a case of *King v. Marissall*, last term,² upon a bill by a judgment creditor to redeem, which came on before Lord Hardwicke, when he asked for the writ of execution; and upon its being produced, admitted the judgment creditor for this reason to redeem.

For want of its being taken out now, the bill must be dismissed, because till execution the plaintiff has no lien on the leasehold estate, and decreed accordingly.³



DUNDAS v. DUTENS.

IN CHANCERY, BEFORE LORD THURLOW, C., JULY 1, 1790.

[Cited from a note by Lord Manners in 2 *Ball & Beatty*, 233.*]

IN the case of *Dundas v. Dutens*, the question was, whether stock that had been settled could be brought within the reach of creditors. I have a note of that case, which on this point is more full than the printed report of it, which I will briefly state. Lord Thurlow says:

¹ 1 Vern. 399.

² 3 Atk. 192, s. c.

³ *Angell v. Draper*, 1 Vern. 399; *Smith v. Hurst*, 1 Coll. 705 (*semle*), *accord.* — ED.

⁴ 1 Ves. Jr. 196; 2 Cox, 240, s. c. — ED.

“Is there any case where stock standing in a trustee’s name can be made available to pay debts, or that debts (and stock is a chose in action), shall be transferred to creditors for that purpose? You cannot have an execution at law against such effects. The opinion in *Horn v. Horn*¹ is so anomalous and unfounded, that forty such opinions would not satisfy me. It would be preposterous and absurd to set aside an agreement, which, if set aside, leaves the stock in the name of a person where you could not touch it.”²

SCOTT v. SCHOLEY AND ANOTHER.

IN THE KING’S BENCH, JUNE 6, 1807.

[Reported in 8 East, 467.]

LORD ELLENBOROUGH, C. J., said that the case involved a question of great magnitude and extent, upon which it was proper for the court to deliberate before they pronounced their judgment. The case therefore stood over till this day, when his Lordship delivered the opinion of the court.

This was an action on the case against the defendants, as sheriff of Middlesex, for a false return of *nulla bona* to a writ of *fieri facias* against the goods and chattels of George Coleman, Esq., which was tried before me, and in which a verdict was given for the plaintiff. Upon a motion for a new trial, it was ordered that the facts should be stated in the form of a case for the opinion of the court. [After stating the material facts of the case his Lordship proceeded.]

The question of law arising out of these facts is, whether the residuary beneficial interest of Mr. Coleman, under the trusts upon which a lease for years in the new theatre in the Haymarket, and the apparatus, &c., belonging to the same had been assigned, and which remains to him, after satisfying the several debts and incumbrances thereupon, and indemnifying the trustees acting under the trust deed, were liable to be taken in execution by a writ of *fieri facias* for the debt of the plaintiff, a judgment creditor. Which question in other and fewer words amounts to this, viz. whether an equitable interest in a term of

¹ Amb. 79.

² *Caillaud v. Estwick*, 2 Anst. 384; *Nantes v. Corrock*, 9 Ves. 182, 189 (*semble*); *Rider v. Kidder*, 10 Ves. 368; *Plasket v. Dillon*, 1 Hog. 328, *accord*.

Horn v. Horn, Amb. 79; *Taylor v. Jones*, 2 Atk. 600 (*semble*); *Hadden v. Spader*, 20 Johns. 554; 5 Johns. Ch. 280; *Storm v. Waddell*, 2 Sandf. Ch. 494 (but see *Donovan v. Finn*, 1 Hopk. 59; *Bramhall v. Ferris*, 14 N. Y. 41, 45; *Graff v. Bonnett*, 31 N. Y. 9, 26; *Campbell v. Foster*, 35 N. Y. 361, 365), *contra*. — Ed.

years can be sold under a *fiery facias*. The sheriff's authority is derived under a writ, by which he is commanded to cause to be made of the goods and chattels of the defendant the sum recovered; and which sum is of course to be made by a sale of the things taken under the execution. If the sheriff should not be able, before his writ is returnable, effectually to execute it in this particular, he is allowed to excuse himself by returning that the goods remain in his hands unsold for want of buyers; upon which another writ issues, commanding him to expose to sale the goods so remaining in his hands unsold. The language of these writs and return evidently imports that the goods and chattels, which are the object of them, are properly of a tangible nature, capable of manual seizure, and of being detained in the sheriff's hands and custody, and such also as are conveniently capable of sale and transfer by the sheriff, to whom the writ is directed, for the satisfaction of a creditor. The legal interest in a term of years, both in respect of the possession of which the leasehold property itself is capable, and also in respect of the instrument by which the term is created and secured (both of which are capable of delivery to a vendee), has been always held to answer the description of the writ, and to be salable thereunder. Dyer, 363 *a*. But no single instance is to be found in the history and practice of the courts of common law in which an equitable interest in a term of years has ever been recognized as salable (seizable of course it cannot be) under a *fiery facias*. Besides, what locality belongs to an equitable interest, a resulting trust, for instance, in a term for years, so as to render it more fitly the subject of execution and sale by the sheriff of any one county than another? The degree of inconvenience which would attend the sale of such interests by the sheriff, although it would in strictness afford no argument against an ascertained legal power of the sheriff on such a subject, is a sufficient reason why the court should anxiously watch the extension of such power in a case in any respect doubtful. What means, in any degree adequate, has the sheriff of taking an account of the actual amount of the incumbrances thereupon, or of ascertaining the extent of the indemnities which the trustees may be entitled to claim? The sale of such an interest, if it were to be made at all by the sheriff, must necessarily be made under circumstances of still greater ignorance and uncertainty as to its value than attend sales of any other description of property; and not only without any legal means of delivering a present possession of the thing sold, but in general without having even the type or instrument of any legal interest whatsoever, present or future, in the subject of such sale, to exhibit to the sight or deliver to the hands of a purchaser. It has indeed been urged in argument, as an inconvenience on the other side, if such equities of redemption in chattel interests shall be held not to be salable under an execution;

that, by means of a mortgage of the largest leasehold property for the smallest sum imaginable, such property might be effectually protected and withdrawn from the legal claims of every creditor. But the inconvenience in the case put does not extend beyond the necessity which such a step would occasion, of resorting to a different remedy, to be applied in another court, upon a bill to be filed by the judgment creditor in such other court for the purpose of obtaining it. In a court of equity he might be let in to redeem such mortgage incumbrances as stood in the way of his common-law remedy by execution; or he might have a decree for the sale of the mortgage term itself, in satisfaction of his rights as an execution creditor. *Shirley v. Watts* is an authority for this purpose; as is also the case of *Burdon v. Kennedy*.¹ In the case of *Lyster v. Dolland*,² Lord Thurlow was at last of opinion that an equity of redemption of a term could not be taken in execution; though at first, under an apprehension that the language of the tenth section of the Statute of Frauds applied to such a case, he had inclined to hold otherwise. But the very silence of that statute, which, while it expressly introduces a new provision in respect to lands and tenements held in trust for the person against whom an execution is sued, says nothing as to trusts of chattel interests, affords a strong argument that those interests were meant to continue in the same situation and plight in respect of executions in which both freehold and leasehold trust interests equally stood prior to the passing of that statute. In the absence, therefore, of any authority in favor of the sale of such an equitable interest under a common-law execution against goods, we are of opinion, upon the grounds already stated, that the sheriff's return of *nulla bona* in this case, where the defendant in the execution had no other property besides the trust property in question, was not a false return; and, of course, that the verdict, which has been obtained by the plaintiff against the sheriff in this case, must be set aside, and a new trial granted.³

¹ 3 Atk. 739.

² Reported in 3 Bro. C. C. 480, and 1 Ves. Jr. 431.

³ *Lyster v. Dolland*, 1 Ves. Jr. 431; *Metcalf v. Scholey*, 2 B. & P. N. R. 461; *Caillaud v. Estwick*, 2 Anst. 381; *Smith v. McCann*, 24 How. 398; *Colvard v. Coxe*, *Dudley* (Ga.), 99; *Russell v. Lewis*, 2 Pick. 508; *Disborough v. Outcalt*, *Saxton*, 298; *Hogan v. Jaques*, 19 N. J. Eq. 123; *Wilkes v. Ferris*, 5 Johns. 335; *Hendricks v. Robinson*, 2 Johns. Ch. 283, 312; *Lynch v. Utica Co.*, 18 Wend. 236; *Wright v. Douglass*, 3 Barb. 554, *accord*.

Pritchard v. Brown, 4 N. H. 397; *Hutchins v. Heywood*, 50 N. H. 491, *contra*.

The provision of the Statute of Frauds (*supra*, p. 455) applies only to bare trusts *Firth v. Norfolk*, 4 Mad. 503; *Doe v. Greenhill*, 4 B. & Al. 684; *Harris v. Booker*, 4 Bing. 96; *Harris v. Pugh*, 4 Bing. 335; *Mellvaine v. Smith*, 42 Mo. 45; *Bogert v. Perry*, 17 Johns. 351; 1 Johns. Ch. 52, s. c.; *Jackson v. Bateman*, 2 Wend. 573, 575 (*semble*); *Lynch v. Utica Co.*, 18 Wend. 236; *Ontario Bank v. Root*, 3 Paige, 478;

KIRKBY v. DILLON.

IN CHANCERY, BEFORE SIR JOHN LEACH, V. C., FEBRUARY, 1824.

[Reported in *Cooper*, 504.]

SIR JOHN LEACH. Formerly it was very common for debtors to convert their legal estates into equitable estates for the purpose of defeating such of their creditors as might obtain judgments. That practice gave rise to numerous bills in this court for what is called an equitable execution. In many cases of that kind the legislature has now given to creditors full relief in the courts of common law by the Statute of Frauds, which directs the sheriff to deliver execution of all lands, which any person is seised or possessed of, in trust for him against whom the execution is sued. Yet, however liberal the construction which the courts of common law may be disposed to put upon this enactment, it is obvious there must be cases in which a debtor has a beneficial interest in land, and yet no one can be said in a legal sense — in such sense as a court of common law must understand the statute — to be seised or possessed in trust for him. At all events, there must be cases in which no process of a common-law court can get at that estate, of which some one is seised or possessed in trust for the debtor. In such cases as these, presenting impediments, which the common-law courts cannot remove, bills for equitable execution must continue to be filed.¹

Kellogg v. Wood, 4 Paige, 578, 619; *Brown v. Graves*, 4 Hawks, 342; *Mordecai v. Parker*, 3 Dev. 425; *Battle v. Petway*, 5 Ired. 576; *Thompson v. Ford*, 7 Ired. 418.

Accordingly the interest of one who is entitled to call for a conveyance of land upon payment of the purchase-money, cannot be taken at law under this statute. *Bogert v. Perry*, *supra*; *Brewster v. Power*, 10 Paige, 562 (*semble*).

The equitable interest must be in the debtor at the time of the execution. *Hunt v. Coles*, Com. 226; *Harris v. Pugh*, 4 Bing. 335.

The equitable interest of a crown debtor may be reached by an extent. *Chirton's Case*, Dyer, 160 *a*; cases cited in Godb. 294, 298, 299; *King v. Smith*, Sugd. V. & P. (10th ed.) Append. No. 18; *King v. De la Motte*, Forr. 162; *King v. Lambe*, McClel. 402. This privilege is derived not from a statute, but from the practice of the exchequer at common law. *Att'y-Gen. v. Sands*, Hard. 495. — *En*.

¹ *Anon.*, 1 P. Wms. 445 (cited); *Smithier v. Lewis*, 1 Vern. 398; *King v. Marisall*, 3 Atk. 192; *Burdon v. Kennedy*, 3 Atk. 739; *Dillon v. Plaskett*, 2 Bligh, n. s. 239; *Smith v. Hurst*, 1 Coll. 705; *Bennett v. Powell*, 3 Drew. 326; *Gore v. Bowser*, 3 Sm. & G. 1; *Partridge v. Foster*, 34 Beav. 1; *Horsley v. Cox*, W. N. (1869), 22; *Tillett v. Pearson*, 43 L. J. Ch. 93; *Anglo-Italian Bank v. Davies*, 9 Ch. D. 275; *Simpson v. Taylor*, 7 Ir. Eq. R. 182, *accord*.

In this country the equitable interests of a debtor are applicable to the satisfaction of his debts, but the mode by which a creditor should proceed is, in most States, regulated by statutes. — *ED*.

NEATE v. THE DUKE OF MARLBOROUGH.

IN CHANCERY, BEFORE LORD COTTENHAM, C., JANUARY 16, 17, 20, 1838.

[Reported in 3 *Mylne & Craig*, 407.]

THIS was a bill filed by a judgment creditor of the Duke of Marlborough. After detailing the transactions out of which the debt arose, and the circumstances under which the original security (which consisted of a bond) was given, the bill stated that final judgment was signed on the 25th of November, 1818. It then went on to allege that the judgment had been duly kept on foot by continuances, and was now in full force, and had not been satisfied, reversed, or vacated; but it did not allege that any *elegit* had been sued out upon the judgment, and in fact no *elegit* had been sued out. It then stated, among other things, the substance of certain deeds, dated the 8th of August, 1818, whereby freehold estates belonging to the defendant, the Duke of Marlborough, and of large annual value, were, together with certain leaseholds and other personal chattels, conveyed to and vested in the other defendant, General St. John, upon the trusts therein mentioned; and it alleged that, under those trusts, a sum of £3,000 a year was payable to the Duke of Marlborough out of the rents and profits of the property comprised in the deeds.

The bill charged that, by virtue of the trusts, the Duke of Marlborough was entitled to an equitable interest in freehold lands to the extent of £3,000 a year or thereabouts, and that, as an unpaid judgment creditor, the plaintiff had an equitable lien upon that annual sum for the amount of his debt. The bill also contained an allegation that the Duke of Marlborough had not now any personal property which was liable to be taken in execution at law; and that unless the plaintiff should be enabled, by the assistance of this court, to obtain satisfaction of his debt out of the Duke's equitable beneficial interest in the estates and premises comprised in the before-mentioned deeds, he would be wholly without the means of recovering payment of his debt.

The bill prayed that the plaintiff might be declared entitled to such lien accordingly; that an account might be taken of what was annually coming to the defendant, the Duke of Marlborough, by virtue of the trust deeds; and that what should be found payable on that account might be applied by the other defendant towards satisfaction of the plaintiff's debt.

The defendants filed separate demurrers to the bill, for want of equity; and the Vice-Chancellor having allowed the demurrers, the plaintiff now appealed.

Mr. Temple and *Mr. Ellison*, for the bill.

Mr. Jacob, *Mr. Wray*, and *Mr. Richards*, for the demurrers.

Mr. Temple, in reply.¹

THE LORD CHANCELLOR. This appeal having been partly argued yesterday, I have had an opportunity of looking into the authorities that were then referred to, and also several others bearing upon the same point; and certainly, if it had not been for the case reported in *Dickens*, I should not have felt the slightest doubt upon the subject. Before finally disposing of the appeal, I will have that case examined.

In the first place, I find Lord Redesdale not only laying it down that it is necessary that the judgment creditor suing in this court should have issued an *elegit*, but expressly saying that if that is not done it is a ground of demurrer. And there was great force in the argument at the bar, that, though his Lordship's attention had been distinctly called to the point, yet when a subsequent edition of his treatise on Pleading was published, and as I have always understood, under his superintendence, the same passage was preserved. I also find Lord Lyndhurst stating it as a general rule, though that was not the point on which the decision of the appeal before him was to turn, that an *elegit* is necessary. For myself, I never entertained the least doubt of it; and certainly, though I have not had particular occasion to look into the question, if I had been asked what the rule of the court was, I should at once have answered that, when a party comes here as a judgment creditor for the purpose of having the benefit of his judgment, he must have sued out execution upon the judgment. And in all the authorities referred to, though in some of them the distinction appears to be so far taken that in the case of a *feri facias* the creditor must go the whole length of having a return, there is no case except the solitary one in *Dickens*, which decides that the suing out of the *elegit* is not necessary as a preliminary step.

With respect to authority, therefore, there can be no doubt; for there is not only the authority of Lord Redesdale and that of Lord Lyndhurst, in the House of Lords, but there is also what is stated at the bar, to be the uniform understanding and practice of the profession.

The conclusion at which I arrive, however, as to what on principle ought to be the rule, is derived from a consideration of the nature of the jurisdiction which the court exercises in such cases. That jurisdiction is not for the purpose of giving effect to a lien which is supposed to be created by the judgment. It is true that, for certain purposes, the court recognizes a title by the judgment, — as for the purpose of redeeming, or, after the death of the debtor, of having his assets administered; but the jurisdiction there is grounded simply

¹ The arguments of counsel are omitted. — Ed.

upon this, that inasmuch as the court finds the creditor in a condition to acquire a power over the estate, by suing out the writ, it does what it does in all similar cases, — it gives to the party the right to come in and redeem other incumbrancers upon the property. So again, after the debtor is dead, if, under any circumstances, the estate is to be sold, the court pays off the judgment creditor, because it cannot otherwise make a title to the estate; and the court never sells the interest of a debtor subject to an *elegit* creditor. That was very much discussed in the case of *Tunstall v. Trappes*.¹ But there was there a necessity for a sale; and the question was not as to the right of the judgment creditor against his debtor, he being willing; but where, from other circumstances, a sale having become indispensable, it was necessary to clear the estate from the claims of parties who had charges upon it.

It is, therefore, not correct to say that, according to the usual acceptation of the term, the creditor obtains a lien by virtue of his judgment. If he had an equitable lien, he would have a right to come here to have the estate sold; but he has no such right. What gives a judgment creditor a right against the estate is only the act of Parliament;² for independently of that he has none. The act of Parliament gives him, if he pleases, an option by the writ of *elegit* — the very name implying that it is an option — which, if he exercises, he is entitled to have a writ directed to the sheriff to put him in possession of a moiety of the lands. The effect of the proceeding under the writ is to give to the creditor a legal title, which, if no impediment prevent him, he may enforce at law by ejectment. If there be a legal impediment, he then comes into this court, not to obtain a greater benefit than the law, that is, the act of Parliament, has given him, but to have the same benefit, by the process of this court, which he would have had at law, if no legal impediment had intervened. How, then, can there be a better right; or how can the judgment, which, *per se*, gives the creditor no title against the land, be considered as giving him a title here? Suppose he never sues out the writ, and never, therefore, exercises his option, is this court to give him the benefit of a lien to which he has never chosen to assert his right? The reasoning would seem very strong, that as this court is lending its aid to the legal right (and Lord Redesdale expressly puts it under that head, namely, the right to recover in ejectment), the party must have previously armed himself with that which constitutes his legal right; and that which constitutes the legal right is the writ. This court, in fact, is doing neither more nor less than giving him what the act of Parliament and an ejectment would, under other circumstances, have given him at law.

The circumstance of the question not having been always raised,

¹ 3 Sim. 286.

² 13 Edw. I. c. 18.

may, in part, account for the obscurity to be found in some of the cases where the subject has been discussed ; but when we consider the nature of the jurisdiction which is exercised by the court in suits by judgment creditors, the obscurity vanishes. The sole reason for coming into this court being founded on a right which the writ of *elegit* confers, the creditor cannot come, without having obtained that right. I am unwilling, however, finally to dispose of the question until I have ascertained the circumstances of the case reported by Mr. Dickens, for I should wish to know whether I am or am not acting against the authority of a decision of Lord Bathurst.¹

¹ Lord Cottenham, on a subsequent day, having made it clear by an extract from the demurrer in *Manningham v. Bolingbroke*, 2 Dick. 533, that Lord Bathurst's decision in that case was not opposed to his own opinion, concluded his judgment as follows : " I have therefore no hesitation in saying, that I entirely concur in the Vice-Chancellor's judgment. The appeal must be dismissed, and I cannot give the plaintiff leave to amend."

Dillon v. Plaskett, 2 Bligh, N. S. 239 ; *Smith v. Hurst*, 1 Coll. 705 ; *Partridge v. Foster*, 34 Beav. 1 (*semble*), *accord*. — Ed.

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SECTION VII.

To what Extent Trust Property is treated as Assets.

SIR THOMAS BENNET AND OTHERS v. MARY BOX AND OTHERS.

IN CHANCERY, BEFORE LORD HYDE, C., 1663.

[*Reported in 1 Cases in Chancery, 12.*]

ANNO 15 Jac. Ralph Allen purchaseth lands in his own name and in the name of Edward Hammond, in trust for Ralph Allen and his heirs, and Hammond to take nothing thereby; but the trust is not expressed in the conveyance. William Allen, senior, did borrow £600 of John Bennet, and the said William Allen, Ralph Allen, and William Allen, junior, son and heir of the said Ralph Allen (William Allen, senior, being first bound in the bond), 1630, did become bound unto the said John Bennet, since deceased, for the payment of the said £600 by bond of £1,000, wherein they bound themselves and their heirs, under whom the plaintiffs are well entitled to the debt in question. And one witness deposeth that Ralph Allen was a good husband, not one that contracted any debts of his own, and believes he and William Allen, junior, were only sureties for William Allen, senior. Ralph Allen dies, and Hammond survives, and after dies; then William Allen, son and heir of Ralph Allen, dieth without issue, and the now defendants, as heirs-at-law, bring their bill against the heirs of Hammond, who had the estate in law, to have the lands conveyed in performance of the trust; which is decreed to them accordingly, and the lands conveyed unto them as heirs-at-law of Ralph Allen.

The now plaintiffs bring their action of debt at law against Henry Box, since deceased, and the now defendants as heirs of Ralph Allen. The defendants thereunto pleaded *riens per discent præter* a third part of a messuage, worth £6 13s. 4d. per annum.

January, 1662. The now plaintiffs bring their bill in this court against the defendants and Henry Box, the defendant's late husband, who had the lands decreed and conveyed unto them as heirs of Ralph Allen, to have them decreed as heirs, to pay the just debts of Allen, or to have the said lands made liable to pay the said debt as assets in equity.

The defendants, Box and Stonehouse, pleaded that the said action still depended, which is a double vexation; and demur, and demand judgment, whether they as heirs shall be charged in equity, without any trust or agreement further than the law chargeth them.

On hearing thereof, a case was stated on the bill, plea, and demurrer ; and afterwards Henry Box died. And before any bill of revivor against the defendants, it was ordered, May 12, 1653, that the defendants do answer the plaintiffs' bill ; but the benefit of the plea to be considered at the hearing.

The defendants deny that they have entered into or received any of the profits of the said lands, the same being ever since 7 Car. extended for the debts of Ralph Allen, and ever since held by Sir John Banks and his executors, and formerly before the extents were let at £500 per annum, and after at £300 per annum, and now but at about £400 per annum, and whereout above £60 is deducted for the charges of the Sea-Banks, and the rest will not pay the interest of the principal debt, as the extendors allege.

An original was filed by the plaintiffs against Henry Box and the other defendants, on the bond in question, in the Common Pleas, bearing teste 16 February, 1659.

The defendant, Walter Stonehouse, did for £400 bargain and sell his third part of the reversion in fee of the lands in question to Henry Box deceased, by deed bearing date 3d of October, 1660 ; and the said Henry paid then to the said Walter the £400 purchase-money for the same, and the defendants, as they swear by their answer, had not then, or in some months after, any notice of the said original, and no notice proved ; and one witness deposes, he believeth there was no notice ; for he being conversant in all Mr. Box's affairs, if there had been any notice he should have heard of it, as he verily believes.

The defendant, George Burdet, after the other defendants were ordered to answer, put in his answer, and thereby insisted on the same matter the other defendants did by their plea and demurrer, and was on June the 9th last past served with process *ad audiendum judicium* upon 21st June following, but appeared not at the hearing, or any for him,

1. Question, Whether the said lands, as this case is, shall or ought to be decreed as assets in equity.

2. Or whether the plaintiffs ought to have any decree in this case against the defendants.

CHIEF JUSTICE HYDE, CHIEF BARON HALES, and JUSTICE WINDHAM were of opinion, on hearing counsel on both sides, that the lands in the said case and bill mentioned (as the case is stated) are not, nor ought to be, decreed as assets in equity, and that the plaintiffs ought not to have any decree against the defendants.

Afterwards, in Hilary Vacation, 1664, the bill was dismissed upon the judge's certificate, 14th November, 1664, or 1661, in a case wherein Clark was plaintiff against Sir Thomas Fanshaw.¹

¹ Prat v. Colt, 1 Ch. Ca. 128, *accord.* — ED.

BARTHROP *v.* WEST.

IN CHANCERY, 1672.

[Reported in 2 Reports in Chancery, 62.]

THE plaintiff's suit is to have the benefit and equity of redemption of leases mortgaged and other trust estates made liable for the payment of his debt, being on judgment for £2,000, and to have a voluntary deed of trust set aside, as against the plaintiff.

This court decreed the plaintiff to have the equity of redemption to be liable, and as assets to satisfy his said debt of £2,000 and set aside the said voluntary deed of trust, and all trust estate and surplus thereof after preceding debts paid to be assets in equity for the payment of the plaintiff.

LORD GREY AND OTHERS *v.* COLVILLE AND OTHERS.

IN CHANCERY, BEFORE LORD FINCH, C., 1678.

[Reported in 2 Reports in Chancery, 143.]

IN CHANCERY, BEFORE SIR FRANCIS NORTH, K., JUNE 15, 1683.

[Reported in 1 Vernon, 172.]

THE plaintiff the Lady Grey's bill is to be relieved for a debt of £1,500 and interest on bond, wherein John Colville did bind himself and his heirs to repay the same unto the plaintiff, her executors and assigns, that the same might be paid out of the lands which were purchased by the said John Colville with his own proper money, in the names of himself and the defendant's wife, to hold to them two for their lives, and then to the heirs of Colville, and the rest were purchased in the names of the said defendants Morriss and Saunders in trust for the said John Colville and his heirs; that soon after and before the £1,500 was paid the said John Colville died, and the right and equity of the premises during the life of the said defendant's wife is in Josia Colville, and the reversion in fee after the death of the said wife will descend to the said defendant, Josia Colville, as son and heir of the said John Colville, and the profits are received by him or for his use; that the said John Colville dying intestate, administration is granted to Dorothy, his relict, who pleads she hath no personal estate, whereupon the Lady Grey commenced a suit at law, by filing an original for her said debt against

the defendant Josia, as son and heir of the said John Colville, and hath got judgment thereon to have satisfaction for the said debt, out of the reversion of the lands of Josia, which descended in fee to the said defendant Josia Colville, and ought to have satisfaction accordingly, but the said defendant Josia pretendeth he hath nothing by descent in present but the reversion of the lands purchased in the names of John Colville and his wife, after the death of his wife, whereas he and the other two defendants were only trustees for John Colville and his heirs, and their trust being now come to the defendant Josiah, they are liable as assets in equity for satisfaction of the plaintiff's debts, and the plaintiff ought to be let into the immediate possession; and the said Josia also insists that the premises are incumbered by a former judgment of one lease for £800, and the plaintiff's creditors, and others the creditors in their suit, seeking relief against the same defendants, upon the same trust and equity, and to have their debts paid out of the said lands, they insisting they are creditors by judgment, grounded on original of the same day and date with the said Lady Grey, and ought to be satisfied in equal degree and time.

The plaintiff Creed and the other creditors insist, that they for so much as the estate in law of wife is in the heir, that their judgments ought to attach the lands according to priority of originals, and though the said Leke hath obtained a decree prior to the creditors in these suits, yet the same is to be subject to the direction of this court, and ought not to take place, but according to the date of their originals.

This court (it being admitted by all that the original on which the said Leke's judgment is grounded, is prior to all the other creditors' originals, and that the plaintiff, the Lady Grey, and Creed's originals are next in priority, and bear the same date one with another, and ought next to be satisfied with other judgments, who originally bear the same date) declared that the estate purchased in the names of the defendant's wife as aforesaid was a trust for life, attending the reversion, and so liable to make the several plaintiffs satisfaction for their debts, and should be enjoyed by the plaintiffs against the said wife and Josiah Colville the heir; and the court decreed that if the estate of wife as aforesaid was not sufficient, then the said reversionary lands purchased in the names of the said Morris and Sanders, after the death of Sir John Tufton, who hath an estate for life in the said lands, should go towards satisfaction of the said debts.

June 15, 1683. The single point of this case was, whether the trust of an estate in fee descended upon the heir is liable in equity to the satisfaction of a debt by bond, wherein the heir is expressly bound.

The late Lord Chancellor had decreed it assets; but upon a rehearing before the Lord Keeper he seemed doubtful.

For the heir against the decree it was said that this point had formerly been settled upon great advice in the case of Box and Bennet, which was heard by the Lord Chancellor, with the assistance of the Lord Chief Justice Hales and Mr. Justice Wadham Windham. And that this decree was unreasonable, in that an account of the profits was decreed during the infancy; whereas at law if the heir is bound in the bond of the ancestor, and after the death of his ancestor is sued during his infancy, the parol must demur, and the plaintiff cannot have judgment against the infant, neither are the profits liable, during his minority.

But for the decree it was argued that the precedent of Box and Bennet was looked upon as a hard case, and had never carried any great authority with it, it being a precedent of the judges' making, who look upon the court of chancery as precarious in its jurisdiction, and therefore, as much as may be, are for restraining it to the rules of law; but a trust, being a creature of this court, ought to be governed solely by the rules of equity, and equity ought to be conformable throughout; and therefore why should not the trust of an inheritance be assets as well as the trust of a term? An equity of redemption is every day made assets in equity; and what reason can be given why in equity a trust of an inheritance should not be assets, where the inheritance itself, had it not been in trust, would have been assets at law?

As to the profits during minority, they said, that was not insisted on by them, though they had no precedent in equity, that the parol should demur; but infants were there suable.

LORD KEEPER. I know the case of Box and Bennet has had hard words given it, and been much railed at; but the decree in that cause was made upon great advice, and he did not know how he could be better advised now, and said, there was a difference between the case of an heir and the case of an executor; and therefore the trust of a term and the trust of an inheritance are not the same thing, as to this point; for whatever money comes to the hands of the executor, either by sale of the term, or if money be decreed to him in this court, will be assets: but if an heir, before an action brought, sells and aliens the assets, the money is not at law liable in his hands, unless the sale were with fraud or collusion; as if an heir sell and buy again, there the new purchased lands will be assets. And as to an equity of redemption, he said that if a man had a mortgage and a bond, before the mortgage should be redeemed by the heir the bond ought to be satisfied; but he did not know that an equity of redemption should be assets in equity to all creditors, and mentioned Mr. Baron Weston's case against Mrs. Danby, which was thus:—

Baron Weston had a debt due to him by bond, wherein the heir was bound, but it happened that for three descents the heir was still an

infant, and so the parol demurred at law, till the interest much exceeded the penalty of the bond; and Mrs. Danby having been all along guardian to these infants, and received the profits of the estate without paying any debts, and converted them to her own use, the Baron therefore brought an action against her, and called her administrator to these children; but the Baron's policy did not prevail.

As to the case in question, his Lordship said he would not throw such a cause out of court without good consideration first had, and that he should be much governed by the precedent of Box and Bennet, unless they could show that the latter precedents had been otherwise; and directed them to attend him with precedents towards the latter end of the term.¹

PLUCKNET v. KIRK.

IN CHANCERY, BEFORE LORD GUILFORD, K., NOVEMBER 15, 1686.

[*Reported in 1 Vernon, 411.*]

AMONGST other matters in this case, the point chiefly disputed was, whether the equity of redemption of a mortgage in fee, since the Statute of Frauds and Perjuries, should be assets in equity to satisfy a debt by bond; and the Lord Chancellor inclined that it was, but respited his decree till the Master had reported a state of the case.²

KING v. BALLETT.

IN CHANCERY, 1691.

[*Reported in 2 Vernon, 248.*]

NOTE, by the Statute of Frauds and Perjuries, the trust of an inheritance is made assets at law, but the trust of a term is not; and by clause, where judgment is obtained against the testator, the sheriff may take the trust estate in execution.

¹ Reg. Lib. 1682, A, fol. 818. This cause came on again the 14th of December, when an order was made for the parties to attend the two Lords Chief Justices and Lord Chief Baron, who were thereby desired to certify their opinion on the question. Reg. Lib. 1683, A, fol. 166. Afterwards in Michaelmas Term, 1684, upon motion of the defendants, it was ordered that unless plaintiffs, the creditors, procured the certificate of Lord Chief Justice's and Lord Chief Baron's opinion, by the first day of the next term, the bill should be dismissed without further motion. Reg. Lib. 1684, A, fol. 210. No further proceedings appear.

² The decree was reserved both as to judgment and bond debts. Reg. Lib. 1686, B, fol. 181. And so afterwards decreed. R. L. id. fol. 844.

Cole v. Warden, 1 Vern. 410; Anon., Freem. C. C. 115, *accord.* — ED.

PLUNKET v. PENSON.

IN CHANCERY, BEFORE LORD HARDWICKE, C., APRIL 3, 1742.

[Reported in 2 Atkyns, 290.]

MR. PENSON, the testator, who was the *cestui que trust* of a real estate, made a mortgage of it in fee,¹ and the equity of redemption being in him, he, by his will, gave and devised to his dear son and to his heirs forever the mortgaged premises, subject nevertheless to the payment of his debts, annuities, and legacies, and died indebted by bond and simple contract.

The question in this case was, if the assets of the testator are legal or equitable; and whether the simple-contract creditors are to come in *pari passu* with the bond creditor, who is the plaintiff; or whether he shall be paid first in a course of administration.

Mr. Cox, who was counsel for the bond creditor, insisted that the assets of the testator must be considered as legal; because, notwithstanding the devise to the heir, it is exactly the same as if the lands descended to him with a charge, and therefore the simple-contract creditors ought not to come in *pari passu*.

He cited the case of Lord Massam v. Harding,² in the Court of Exchequer, 1734, where an equity of redemption was held to be legal assets; but I must be so candid as to own that Lord Chief Baron Comyns took this distinction, that if it was a mortgage for years, then it would be legal assets, because the whole interest was not gone from the mortgagor, the reversion in fee being left in him; otherwise where it is a mortgage in fee; and before Mr. Verney at the Rolls, the case of Spencer v. Biffin, in Mich. Term, 1734,³ was determined upon the authority of Massam v. Harding; he cited also Frimoult v. Dedire,⁴ in which Lord Macclesfield held, where one devises his lands for payment of his debts, bonds and simple-contract debts shall be paid equally; but if he only charges his lands with the payment of his debts, so that the land descends subject to the debts, the bonds shall be preferred before the simple-contract debts.

Mr. Attorney-General, for the simple-contract creditors, insisted that a devise to an heir of an estate charged with debts is exactly the same thing as devising it in trust to him for the payment of his debts,

¹ In this mortgage one Benjamin Young joined, who seems to have been the trustee. But in the decree Lord Hardwicke directed the Master to inquire whether Benjamin Young, an infant, was a trustee within the stat. 7 Anne.

² Bunb. 339, s. c.

³ Vide 3 Cox's P. Wms. 344, n. 3.

⁴ Et c con., 1 P. Wms. 430.

and then they are equitable assets, and all creditors are entitled to come in *pari passu*.

The bond creditor in this case cannot recover at law, because the testator, who was the obligor, had not the legal estate, it being a trust estate, and in mortgage, and therefore was obliged to come into this court for a satisfaction.

Mr. Moreton, on the same side, cited the case of *Kent v. Craigs*, between the seals after Michaelmas Term, 1741; the question there arose upon the will of *Mr. Wrottesley*, who bequeathed, after his lawful debts are paid and funeral expenses are defrayed, all he is now in possession of, or anywise entitled to, to his aunt *Mrs. Craigs*, and made her executrix, and yet held by Lord Hardwicke that they are equitable and not legal essets, and that creditors must come in *pari passu*.

LORD CHANCELLOR. If, in the case of *Lord Massam v. Harding*, it was a mortgage in fee, the bond creditor could not come at it, as the obligor had not the legal estate; for I think my Lord Chief Baron Comyns's distinction was right in that case, between a chattel mortgage and a mortgage in fee.

I should be glad to be informed whether there is any instance where an equity of redemption has ever been held to be liable to the execution of a bond creditor in the life of the mortgagor; to which the counsel in this case made answer, they could not recollect any instance where it had been so held.

The particular question here is, whether the creditors shall come in *pari passu*, or whether a bond creditor is entitled to the preference.

The testator was never entitled any otherwise than as *cestui que trust* of a real estate, which he mortgaged, and having consequently the equity of redemption of a trust estate, makes his will, and devises to, &c. (*vide* the will as before stated), then dies indebted by bond and simple contract.

The first question, supposing the testator had been seised of a legal estate, is, whether, by force of the will, this is not out of the statute of fraudulent devises, 3 & 4 Will. & Mar. c. 14, this depends clearly upon the construction of that statute. By this act, "all wills, dispositions, or appointments of lands or tenements, &c., whereof any persons, at the time of their decease, shall be seised in fee-simple in possession, reversion, or remainder, or have power to dispose of the same by their last wills, shall be deemed and taken (only as against creditors by bond or specialty binding the heir) to be fraudulent and void; and every such creditor shall have his action of debt upon his and their bonds and specialties, against the heir-at-law of such obligors and such devisees jointly."

Now, before the making of this act of Parliament, at common law a bond creditor, where the land was devised, had no remedy against the

devisee, and therefore this statute has taken care that such a devisee shall not prevent the remedy.

Then comes the proviso: "Provided always, that where there hath been or shall be any limitation or disposition of lands or tenements for the raising or payment of just debts or portions for children, other than the heir-at-law, in pursuance of any marriage-contract or agreement in writing, *bona fide* made before marriage, the same and every of them shall be in full force."

The consequence of this proviso is, that it operates by way of exception upon such devises as are for payment of debts; for this clause does not give any new force to the law in this particular case, but leaves it just as it stood before the making of the act.

The question will be, then, whether the devise here has broke the descent: if it has, then, in point of law, all consequences insisted on by Mr. Attorney-General will follow; for the bond creditor is deprived of his remedy at law, and forced to come into this court: but if it has not broke the descent, then this court has no right to take from a specialty creditor his remedy at law.

As at present advised, I do conceive it does not break the descent; and for this purpose *vide* Clark v. Smith,¹ in Lord Chief Justice Treby's time, where the court held that, if the same estate is devised to H. which he would have taken by descent, he is in by descent, notwithstanding the possibility of a charge; if so, I do not know that a court of equity has ever taken away from a bond creditor his right which he has at law. The case of Freemoult v. Dedire comes very near the present.

In the fifth section of the statute of fraudulent devises, which relates to the heirs-at-law aliening the land descended in order to avoid the payment of just debts before action brought against him, it is enacted "that such heir shall be answerable for such debts to the value of the land so aliened, &c., in which cases all creditors shall be preferred as in actions against executors or administrators, and such executions shall be taken out upon any judgment so obtained against such heir to the value of the same land as if the same were his own proper debt;" but as to that part in the first proviso which takes notice of a devise for raising portions, it is so darkly penned that I do not well understand the meaning of it.

I think this case differs from Kent v. Craig, cited by Mr. Moreton, for there the testator first charged his lands with the payment of his debts, and then devised the estate so charged to a collateral relation, so that, being a devise to a stranger, the descent was broke, and there was no remedy but from the statute, and consequently there was a ground for making it equitable assets; but in Freemoult v. Dedire the descent

¹ 1 Salk. 241.

was not broke. In *Kent v. Craig* the whole rested upon the statute, for not only a devise, but an appointment for payment of debts, are enumerated in the enacting clause : here the descent is not broke, and the creditor may have his remedy at law, supposing the testator to have been seised of the legal estate.

But the second question will be, whether an equity of redemption of a mortgage in fee of a trust estate ought to be considered as legal or equitable assets.¹

I do agree that if a mere trust estate descends upon an heir-at-law, that it will be considered as legal and not as equitable assets ; and this is founded upon the third clause of the statute, which gives a specialty creditor his remedy at law by an action of debt against the heir of the obligor, but it has not made a mortgage in fee of a trust estate subject to the same thing.

If there is a mortgage for a thousand years, and the reversion in fee left in the mortgagor, it will be legal assets, because the bond creditor might have judgment against the heir of the obligor, and a *cesset executio* till the reversion come into possession ; but where it is a mortgage of the whole inheritance, I do not see what remedy a bond creditor can have to make it assets at law ; and if the specialty creditor should bring an action against the heir, he may plead *riens per discent*.

Therefore if the plaintiff is under a necessity of coming here for relief, this court will act according to its known rule of doing equal justice to all creditors, without any distinction as to priority.²

¹ The distinction between legal and equitable assets was explained as follows by Sir R. T. Kindersley, V. C., in *Cook v. Gregson*, 3 Drew. 549. "Such difficulty has sometimes arisen in determining the precise distinction between legal and equitable assets. The general proposition is clear enough, that when assets may be made available in a court of law, they are legal assets ; and when they can only be made available through a court of equity, they are equitable assets. This proposition does not, however, refer to the question whether the assets can be recovered by the executor in a court of law or in a court of equity. The distinction refers to the remedies of the creditor, and not to the nature of the property. The question is not whether the testator's interest was legal or equitable, but whether a creditor of the testator, seeking to get paid out of such assets, can obtain payment thereout from a court of law, or can only obtain it through a court of equity. This, I apprehend, is the true distinction. If a creditor brings an action at law against the executor, and the executor pleads *plene administravit*, the truth of the plea must be tried by ascertaining what assets the executor has received, and whatever assets the court of law in trying that question would charge the executor with must be regarded as legal assets ; all others would be equitable assets." — ED.

² Mr. Lewin, after citing in his treatise on the Law of Trusts (3d ed.), 690, the foregoing passage from Lord Hardwicke's opinion, makes the following observations : "But whatever force may be attributed to these observations, it certainly was not decided by this case that an equity of redemption in fee should be administered as equitable assets. Had the ancestor been seised of the legal fee, Lord Hardwicke held, that, as the legal descent would not have been broken by the equitable charge, the bond

His Lordship declared the will of Thomas Penson ought to be established, and the trusts thereof performed ; and decreed the same accordingly ; and directed an account of his personal estate, and to be applied in payment of his debts, in a course of administration ; and if that should not be sufficient, then an account to be taken of the rents and profits of the testator's real estate, and to be applied in payment of the testator's debts, not satisfied out of his personal estate, *pari passu*. And in case the personal estate, and rents and profits of the real estate of the testator, shall not be sufficient to pay his debts, it was ordered, with the consent of the mortgagees, that the real estate should be sold, and the money arising by the sale, after payment of the mortgages, was directed to be applied in discharge of what shall be remaining due to the other creditors of the testator *pari passu*. And if any of the creditors by specialty have exhausted any part of the testator's personal estate in satisfaction of their debts, then they were not to come upon or receive any further satisfaction out of the testator's real estate, until the other creditors shall thereout be made up equal to them.

creditor might at law have recovered his debt against the heir ; and thus, having a claim *dehors* the will, would have been preferred to the simple-contract creditors, who had only a title under the will. But the ancestor was seised, not of the legal fee, but of an equity of redemption ; and against the heir of such an interest the bond creditor had no action at law, but only a remedy in chancery. Now the equitable right was to be made strictly analogous to the legal right ; and as at law the bond creditor could only have sued the heir, and not the devisee for payment of debts, the question for consideration was, whether the equitable interest had descended or been devised. The testator by charging the land with his debts had certainly not broken the descent as to the surplus interest that might come to the heir ; but, as the debts exceeded the value of the estate, he had disposed of the whole beneficial interest, and the bond creditor could have no remedy against the heir, for there was *riens per descent*: he could only come into equity with the other creditors under the equitable charge ; and as an estate devised for payment of debts must be administered as equitable assets, the bond creditor had no claim to priority. The decision viewed in this light is not at variance with Lord Nottingham's decree in *Grey v. Colville*.

"In *Sharpe v. The Earl of Scarborough*, 4 Ves. 538, a testator died seised of an equity of redemption in fee, and the dispute was between the creditors who had obtained judgments in the lifetime of the testator, and the simple-contract creditors, who claimed under a charge in the will. Lord Loughborough held, that, as the judgment creditors might have redeemed according to their priorities, they had liens upon the estate, and were therefore entitled to preference. This was the single point determined, though the case has often been cited in support of the doctrine just advocated that an equity of redemption in fee shall be administered as legal assets." See further *Foster v. Handley*, 1 Sim. N. S. 200 ; 15 Jur. 73 ; *Re Burrell*, L. R. 9 Eq. 443. — ED.

SECTION VIII.

The Effect of Marriage upon the Interest of a Cestui que Trust in Trust Property.

(a) DOWER IN TRUST PROPERTY.

BOTTOMLEY v. LORD FAIRFAX.

IN CHANCERY, 1712.

[Reported in *Precedents in Chancery*, 336.]

IN this case it was clearly agreed that if a husband before marriage conveys his estate to trustees and their heirs, in such manner as to put the legal estate out of him, though the trust be limited to him and his heirs, that of this trust estate the wife, after his death, shall not be endowed, and that this court hath never yet gone so far as to allow her dower in such case.¹

D'ARCY v. BLAKE.

IN IRELAND, IN CHANCERY, BEFORE LORD REDESDALE, C., MARCH 9, 1805.

[Reported in 2 *Schools & Lefroy*, 387.]

IN this case it had been referred to the Master to inquire and report whether the defendant Margaret Blake was entitled to dower out of all or any, and which of the estates of her late husband, if not bound by a certain deed in the plaintiff's bill mentioned. It appeared that the estates in question were let at the time of the marriage upon leases for lives, which continued during the coverture. The Master reported that the defendant was not entitled to dower, to which report the defendant excepted.

¹ *Colt v. Colt*, Ch. Rep. 254; *Radnor v. Rotheram*, Prec. Ch. 65; *Att'y-Gen. v. Scott*, Cas. t. Talb. 138; *Chaplin v. Chaplin*, 3 P. Wms. 229; *Shepherd v. Shepherd*, 3 P. Wms. 234, n. (D); *Reynolds v. Massing*, 1 Atk. 604 (cited); *Godwin v. Winsmore*, 2 Atk. 525; *Dixon v. Saville*, 1 Bro. C. C. 326; *Curtis v. Curtis*, 2 Bro. C. C. 630 (*semble*); *Casborne v. Scarfe*, 2 J. & W. 194; *Burgess v. Wheate*, 1 Eden, 197; *Hamlin v. Hamlin*, 19 Me. 141; *Reed v. Whitney*, 7 Gray, 533; *Lobdell v. Hayes*, 4 All. 187; *Claiborne v. Henderson*, 3 Hen. & M. 322, *accord*.

Dower in trust property is now given by statute in most, if not in all, jurisdictions.—ED.

Mr. Saurin, Mr. Burston, Mr. Williams, and Mr. Lynch, for the exception. The distinction taken, Co. Lit. 32 *a*, between a reversion expectant on a lease for life and on a lease for years is a fanciful distinction. There is no reason why a woman should be endowed of a rent reserved upon a lease for years and not of a rent reserved upon a lease of lives. It is admitted that if it were a rent reserved on a gift in tail, she would be dowable thereof, and yet in that case the husband is not seised of the freehold. In this case, too, the leases were made by the ancestor and not by the husband; and a distinction is taken between an incumbrance created by the ancestor and by the husband as to the wife's dower. *Banks v. Sutton*.¹ As equity would in the case of a mortgage put a term out of her way, so it ought to do here, as to these leases; and to give her dower of a third of the rent.

The Attorney-General, Mr. Burton, and Mr. Daniel, against the exception. It is too well settled to be now brought in question, that a wife is not entitled to dower in such a case as this. Fitzherb. Abr. Dower, pl. 184; Bro. Abr. Dower, pl. 44; pl. 60; pl. 89; Co. Lit. 32 *a*; Co. Lit. 208 *a*; Harg. Note, Perk. f. 333, 348. *Banks v. Sutton* has been overruled by subsequent cases, as appears from Mr. Cox's note (2), 2 P. Wms. 719. *Forder v. Dade*.²

LORD CHANCELLOR. The general principle on which courts of equity have proceeded in cases of dower is, that dower is to be considered as a mere legal right; and that equity ought not to create the right where it does not subsist at law; that therefore there can be no dower of an equity of redemption reserved upon a mortgage in fee, though there may of an equity of redemption upon a mortgage for a term of years, because in that case the law gives dower subject to the term. A court of equity will assist a widow by putting a term out of her way, where third persons are not interested.³ But against a purchaser, a court of equity will not give that assistance, as in *Lady Radnor v. Vandebendy*.⁴ The difficulty in which the courts of equity have been involved, with respect to dower, I apprehend, originally arose thus: They had assumed, as a principle in acting upon trusts, to follow the law; and according to this principle, they ought in all cases where rights attached on legal estates, to have attached the same rights upon trusts; and consequently to have given dower of an equitable estate. It was found, however, that in cases of dower this principle, if pursued to the utmost, would affect the titles to a large proportion of the estates in the country; for that parties had been acting on the footing of dower, upon a contrary principle, and had supposed that by the creation of a

¹ 2 P. Wms. 708.

² 4 Bro. C. C. 526.

³ *Radnor v. Vandebendy*, Prec. Ch. 65; *Dudley v. Dudley*, Prec. Ch. 241, *accord.* — Ed.

⁴ Prec. Ch. 65, by the name of *Lady Radnor v. Rotheram*, Show. Parl. Cas. 96.

trust the right of dower would be prevented from attaching. Many persons had purchased under this idea; and the country would have been thrown into the utmost confusion if courts of equity had followed their general rule with respect to trusts in the cases of dower. But the same objection did not apply to tenancy by the curtesy; for no person would purchase an estate subject to tenancy by the curtesy, without the concurrence of the person in whom that right was vested. This I take to be the true reason of the distinction between dower and tenancy by the curtesy. It was necessary for the security of purchasers, of mortgagees, and of other persons taking the legal estates, to depart from the general principle in case of dower; but it was not necessary in the case of tenancy by the curtesy. Pending the coverture, a woman could not alien without her husband; and therefore nothing she could do could be understood by a purchaser to affect his interest: but where the husband was seised or entitled in his own right, he had full power of disposing, except so far as dower might attach; and the general opinion having long been that dower was a mere legal right, and that as the existence of a trust estate previously created prevented the right of dower attaching at law, it would also prevent the property from all claim of dower in equity; and many titles depending on this opinion, it was found that it would be mischievous in this instance to the general principle that equity should follow the law; and it has been so long and so clearly settled that a woman should not have dower in equity who is not entitled at law, that it would be shaking everything to attempt to disturb the rule. In point of remedy, a woman claiming dower may be assisted in equity: a court of equity will put out of her way a term which prevents her obtaining possession at law; but that is only as against an heir or volunteer, not a purchaser, the heir or volunteer being considered as claiming in no better right than she does. When, therefore, any question of dower has arisen in courts of equity, and doubts have been entertained of the title to dower, the constant practice in England has been to put the widow to bring her writ of dower at law. The courts will assist her in trying her right, and enjoying the benefit of it, if determined at law in her favor, by giving her a discovery of deeds, by ascertaining metes and bounds; and they do not require her to execute the writ with all the formalities necessary at law; and the right being ascertained by judgment at law, will give her possession according to her right; but still they require that the question of her title to dower, if subject to doubt, should be determined at law. What was thrown out by Sir Joseph Jekyll in *Banks v. Sutton*,¹ has been long overruled.² The rule of courts of equity, so far as it excludes a widow from dower of an equitable estate against an heir or volunteer, goes perhaps beyond the

¹ 2 P. Wms. 700.

² See Cox's note (1), 2 P. Wms. 719.

reason of the rule. But I have called this subject to my recollection a good deal, by looking into the authorities since this case was first mentioned; and the decisions to the full extent are so old, so strong, and so numerous, so generally adopted in every book on the subject, and so considered as settled law, that it would be very wrong to attempt at this time to alter them. Nor do I think that the doubts which have been suggested with respect to an equitable estate can be fairly raised in this case, where the claim is of dower of estates leased for lives before the marriage, and continuing subject to such leases, at the death of the husband. Of those parts of his estate, the late husband of the defendant Margaret Blake was not so seised as to entitle her to dower at law; and if equity were strictly to follow the law, she could have no claim in equity for dower of those estates. He had not such seisin as to entitle her to dower; and the exception must be therefore overruled.¹

¹ In *Att'y-Gen. v. Scott*, Cas. t. Talb. 138, Lord Talbot said, p. 139: "No dower was of a use before the statute (*a*), as appears from *Vernon's Case*, 4 Co. 1. And then how can she be dowable of a trust after the statute, since no difference can be assigned between a trust now and a use before the statute? And courts of equity must follow the same rules now as to trusts, as prevailed before the statute as to uses. How the difference now received, between tenant by the curtesy and tenant in dower, ever came to be established, I cannot tell; but that it is established is certain." — Ed.

(*a*) *Crumwel v. Andros*, 2 And. 69, 75 (*semble*); *Vernon's Case*, 4 Rep. 1 *b*; *Doct. & Stud. Dial.* II. c. 22; *Chaplin v. Chaplin*, 3 P. Wms. 229, 234; *Preamble to Statute of Uses*, 27 Hen. VIII. c. 10, *accord*. — Ed.

SECTION VIII. (*continued*).

(b) CURTESY IN TRUST PROPERTY.

SWEETAPPLE v. BINDON.

IN CHANCERY, BEFORE SIR NATHAN WRIGHT, K., FEBRUARY 9, 1705.

[*Reported in 2 Vernon, 536.*]

W. B. devised £300 to her daughter Mary, to be laid out by her executrix in lands, and settled to the only use of her daughter Mary and her children; and if she died without issue, the lands to be equally divided between her brothers and sisters then living. The plaintiff married Mary the legatee, and had issue by her; but she and her child being both dead, and the money not laid out in land, the bill was, that the plaintiff might either have the money laid out in lands, and settled on him for life, as being tenant by the curtesy, or in lieu of the profits of the lands might have the interest of the money during his life.

Per Cur. If it had been an immediate devise of land, Mary the daughter would have been, by the words in the will, tenant in tail, and consequently the husband would have been tenant by the curtesy; and in the case of a voluntary devise the court must take it as they found it, and not lessen the estate or benefit of the legatee; although upon the like words in marriage-articles it might be otherwise, where it appeared the estate was intended to be preserved for the benefit of the issue; and therefore decreed the money to be considered as lands, and the plaintiff to the interest or proceed thereof, for his life, as tenant by the curtesy.¹



WATTS AND ANOTHER v. BALL AND ANOTHER.

IN CHANCERY, BEFORE LORD COWPER, C., HILARY TERM, 1708.

[*Reported in 1 Peere Williams, 108.*]

THE case in effect was: One seised of lands in fee had two daughters and devised his lands to trustees in fee, in trust to pay his debts, and to convey the surplus to his daughters equally.

The younger daughter married and died, leaving an infant son and her husband surviving.

The eldest daughter brought a bill for a partition; and the only question was, whether the husband of the younger daughter should have an estate for life conveyed to him, as tenant by the curtesy?

¹ *Cunningham v. Moody*, 1 Ves. 174; *Dodson v. Hay*, 3 Bro. C. C. 405, *accord.* — ED.

The husband in his answer had sworn that he married the younger daughter upon a presumption that she was seised in fee of a legal estate in the moiety; that at the time of the marriage she was in the actual receipt of the profits of such moiety; and it was admitted, that this trust was not discovered until after the death of the younger daughter, nor until it was agreed that a partition should be made.

Decreed by LORD CHANCELLOR, that trust estates were to be governed by the same rules, and were within the same reason, as legal estates; and as the husband should have been tenant by the curtesy, had it been a legal estate, so should he be of this trust estate; and if there were not the same rules of property in all courts, all things would be, as it were, at sea, and under the greatest uncertainty.

His Lordship added, that this being a case of some difficulty, he could have wished it had not come before him as a cause by consent; but his opinion was, that the husband ought to be tenant by the curtesy, and the rather, because it appeared that he upon his marriage did conceive and presume his wife to be seised of a legal estate in the moiety, and had reason to think so, she being in possession thereof.

Wherefore it was decreed that an estate for life in a moiety in severalty should be conveyed by the trustees to the husband, with remainder in fee to his son.

In this cause, *Mr. How* (who was for the husband) cited the case of *Sweetapple v. Bindon*, where money was devised to be laid out, for the benefit of a *feme sole* in the purchase of lands in fee; the *feme* married, and had issue, and died, the husband surviving; and decreed in equity that though the money was not invested in a purchase during the life of the wife, yet in regard, in this case, if it had been so laid out, the husband would have been tenant by the curtesy, and that this was as land in equity, therefore the husband was equally entitled.¹

¹ *Chaplin v. Chaplin*, 3 P. Wms. 234 (*semble*); *Att'y-Gen. v. Scott*, Cas. t. Talb. 139 (*semble*); *Casborne v. Scarfe*, 1 Atk. 603; *Parker v. Carter*, 4 Hare, 400; *Robinson v. Codman*, 1 Sumn. 121, 128; *Rawlings v. Adams*, 7 Md. 26, 54; *Houghton v. Hapgood*, 13 Pick. 154; *Gardner v. Hooper*, 3 Gray, 398; *Alexander v. Warrance*, 17 Mo. 228; *Baker v. Nall*, 59 Mo. 268; *Tremmel v. Kleiboldt*, 6 Mo. Ap. 549; *Senthill v. Robeson*, 2 Jones Eq. 510 (*semble*); *Lowry v. Steele*, 4 Ohio, 170; *Dubs v. Dubs*, 31 Pa. 154, *accord*.

A husband of *cestui que use* was not entitled to curtesy. *Brooke Abr. Feoff. al Uses*, pl. 40; *Chudleigh's Case*, 1 Rep. 122 a; *Gilbert Uses*, 11, 171; *Lewin Trusts*, *Intro.* (7th ed.) 3. — ED.

APPLETON v. ROWLEY.

IN CHANCERY, BEFORE SIR R. MALINS, V. C., MARCH 10, 1869.

[*Reported in Law Reports, 8 Equity, 139.*]

THIS case came on upon further consideration.

Samuel Duffield, by his will dated in March, 1843, devised and bequeathed all his real and personal estate to his wife Alice Duffield and three other persons, their heirs, executors, administrators, and assigns, upon trust to permit his wife to receive the clear rents, income, and profits arising from his landed estates and funded property for her life, and after her decease upon trust to sell the sixteen freehold houses therein designated, and invest the produce in government securities, and he charged the said sixteen houses or the produce upon the sale thereof with the payment of certain legacies, and the remainder or overplus which might arise from the sale of such sixteen houses he gave and bequeathed in equal moieties between Sarah Gaywood and Alice Key, as tenants in common, and their respective heirs or representatives. And upon further trust as to five other freehold houses after the death of his wife to stand possessed thereof unto and to the use of Alice Key, her heirs and assigns for ever, free from the control, intermeddling, debts, or engagements of any husband with whom she might intermarry, and that her receipt alone should be a full and effectual discharge to the trustees for the time being for all purposes and upon all occasions. But in the event of her dying without having any child or children, then to stand possessed of the said five houses unto and to the use of three persons therein named, their heirs and assigns, for ever, as tenants in common. And the residue of his real and personal estate the testator gave upon trust for his wife, her heirs, executors, administrators, and assigns absolutely, and to be conveyed and disposed of as she might think fit or direct.

Alice Key, a married woman, died after the institution of the suit, and there was one child of her marriage.

The first¹ question argued was whether the husband of Alice Key was entitled as tenant by the curtesy to the five freehold houses devised to trustees upon trust for Alice Key, her heirs and assigns, for ever, for her separate use.

Mr. Charles Hall, for the plaintiff, the husband of Alice Key. Upon the question of curtesy there have been conflicting opinions entertained by the judges, but at the present time as the authorities now stand there cannot be a doubt that the husband of Alice Key is entitled to the estate by the curtesy. The principle is stated in *Lewin on Trustees*

¹ Only so much of the case is given as relates to this question. — ED.

(5th ed. p. 524), where it is said to be now settled that the husband takes by curtesy if there be a trust for the separate use of the wife, although her seisin would not entitle her husband to the possession or profits.

Lord Hardwicke's decision in *Roberts v. Dixwell*,¹ would have been in favor of the husband having curtesy if there had been a tenancy in tail, but he decided adversely to the husband on the ground that the wife had only a life estate. It is true that Lord Hardwicke appeared to entertain a different opinion when he decided *Hearle v. Greenbank*;² but that case has never been considered good law, and was not followed by Sir J. Leach in *Morgan v. Morgan*,³ where his Honor, after referring to those conflicting opinions, said, under such circumstances recourse must be had to principle and analogy; and as a husband was entitled to the curtesy at law where the wife was seised of an estate of inheritance, so in equity, which followed the law in the quality of estates, a husband would become tenant by the curtesy wherever the wife during coverture was in possession of an equitable estate of inheritance, and that in that case the wife had an equitable estate of inheritance notwithstanding the rents and profits were to be paid to the separate use of the wife for life; and in *Follett v. Tyrer*⁴ the Vice-Chancellor decided in conformity with *Morgan v. Morgan*.⁵ It was decided that a fee may be settled upon a married woman to the exclusion of her husband as in *Taylor v. Meads*,⁶ and *Lechmere v. Brotheridge*.⁷ In *Moore v. Webster*,⁸ Vice-Chancellor Stuart seemed to be of opinion that *Hearle v. Greenbank*⁹ was still good law; but it was not upon that case that he decided the husband was not entitled to the curtesy, but because he considered that the wife was only entitled to a life estate. Still his Honor said that where a husband was not excluded from all interest in the fee, though he might be from the life estate, he was not excluded from being tenant by the curtesy. And in *Harris v. Mott*,¹⁰ where there was an estate to a woman "to and for her own sole and separate use and benefit," it was taken for granted that the husband was tenant by curtesy.

Mr. Laing, for persons in the same interest.

Mr. Bazalgette, Q. C., for the infant, claimed adversely to the curtesy. The case of *Hearle v. Greenbank* is distinct on the point that curtesy does not attach. The subsequent cases do not show that the husband is entitled to curtesy where the estate is subject to separate use. It is laid down that the wife must have an actual seisin. If the wife is seised, the husband has a joint seisin. Here the estate is given to the wife and her heirs for her separate use; there is no case in

¹ 1 Atk. 607.

⁴ 14 Sim. 125.

⁷ 32 Beav. 353.

¹⁰ 14 Beav. 169.

² 3 Atk. 695, 715.

⁵ 5 Mad. 408.

⁸ Law Rep. 3 Eq. 267.

³ 5 Madd. 408.

⁶ 34 L. J. Ch. 203.

⁹ 3 Atk. 695.

which curtesy has attached under such circumstances. *Roberts v. Dixwell*¹ was overruled by Lord Hardwicke himself, in deciding the subsequent case of *Hearle v. Greenbank*. The principle is, that the husband must have a seisin which has commenced in the life of the wife. In this will, the whole object is to exclude the husband from taking any interest during the life of his wife. Every care has been used to prevent the husband from taking anything. In *Molony v. Kennedy*,² the Vice-Chancellor of England said that where a married woman made no disposition of the saving of separate estate during her life, the quality of separate property ceased at her death.

SIR R. MALINS, V. C. The rules of this court are clear, that the husband is entitled to curtesy whenever the wife is, at law or in equity, seised of an estate of inheritance. This question arises in respect of the husband of Alice Key, who is said to be entitled to curtesy out of the five freehold houses devised to trustees to stand possessed thereof unto and to the use of Alice Key, her heirs and assigns for ever, for her sole and separate use. The devise, therefore, is to her in fee-simple, with a direction that the property shall be for her separate use.

The effect of the devise is to give her power to alienate the property without the concurrence of her husband. If she had conveyed it by deed, or devised it by will, the trustees would have been bound to convey the legal estate to any person taking under such deed or will. She had the whole equitable estate in fee-simple, and it being clear that curtesy attaches wherever the wife is entitled to a fee, why should not the husband have curtesy in this property?

The separate use clause is for the protection of the wife, and would have entitled her as against her husband to make an alienation. She has died without making any disposition of the property, and was seised of the equitable estate in possession. My opinion is, that the estate is subject to curtesy. It would be contrary to every principle that a clause introduced for the benefit and protection of the wife should prevent the husband from having his right to curtesy.

There is no doubt that the authorities are conflicting. In *Roberts v. Dixwell*,³ the testator directed his trustees to convey one-fourth of his property to the use of his daughter for life for her separate use, and after her decease in trust for the heirs of her body. Lord Hardwicke expressed himself thus: "The next question will be, whether the devise to the wife for her separate use will bar the husband of his curtesy. I am of opinion it will not, because here is a sort of a seisin in the wife. My Lord Coke says, that to make a tenancy by the curtesy there ought to be a right in the husband inchoate in the life of the wife; but he does not say that he should be seised of the rents and profits. There-

¹ 1 Atk. 607.

² 10 Sim. 254.

³ 1 Atk. 607, 609.

fore, I think if this had been an estate-tail, he would have been entitled to be tenant by the curtesy, notwithstanding this court, by their authority, might have prevented the husband from intermeddling with the rents and profits during the life of the wife. But, upon the whole, I am of opinion the wife could not take an estate in tail, but took an estate for life only." And, on the ground that the husband was absolutely excluded from all benefit in the estate, either in the life of the wife or after her decease, Lord Hardwicke held that the husband was excluded from the curtesy. Then there is the contrary opinion expressed by Lord Hardwicke in *Hearle v. Greenbank*,¹ where the rents of the estate were to be applied to the separate use of the wife, and the trustees, who had the fee in all the real estate, were to permit the wife to dispose of it. There Lord Hardwicke decided that the husband could not be tenant by the curtesy, because the whole legal estate of inheritance was in the trustees.

The true criterion is, whether the wife is seised of an equitable estate of inheritance. In *Follett v. Tyrer*,² the property was conveyed to trustees in trust for the separate use of the wife for life, with remainder as she should appoint, and in default of appointment, to her right heirs for ever. The wife died without exercising the power, and it was held that her husband was entitled to the curtesy. Then there is the recent case of *Moore v. Webster*,³ where the real estate was limited to the separate use of the wife, and to be assigned and disposed of as she might think fit by deed or will; and Vice-Chancellor Stuart held that the husband was not entitled to curtesy, on the ground that he was totally excluded from the whole marital interest. I am unable to concur in that decision, for there the whole equitable fee was given to the wife.

I think, from a review of all the cases, and upon the sound principles of law, that wherever a wife is seised of an estate in fee-simple or fee-tail in possession, whether legal or equitable, the husband cannot be excluded from the curtesy, he will, therefore, in this case be entitled to this estate for life by the curtesy.⁴

¹ 3 Atk. 695, 716.

² 14 Sim. 125.

³ Law Rep. 3 Eq. 267.

⁴ *Roberts v. Dixwell*, 1 Atk. 609 (*semble*); *Morgan v. Morgan*, 5 Mad. 408; *Follett v. Tyrer*, 14 Sim. 125; *Cooper v. McDonald*, 7 Ch. D. 288 (*semble*); *Payne v. Payne*, 11 B. Mon. 138; *Cushing v. Blake*, 29 N. J. Eq. 399; *Clark v. Clark*, 24 Barb. 581; *Ege v. Medlar*, 82 Pa. 86; *Tillinghast v. Coggeshall*, 7 R. I. 383; *Harvey v. Heiskell*, 1 Coldw. 641, *accord*.

Hearle v. Greenbank, 3 Atk. 715 (overruled); *Moore v. Webster*, L. R. 3 Eq. 267 (overruled), *contra*.

In *Cooper v. McDonald*, *supra*, Sir G. Jessel, M. R., said, p. 295: "Now, I will first of all consider whether he [the husband] had an estate by the curtesy or not, because that has been very much argued. It appears to me that he had and he had not, that is to say, as I understand the law, if the married woman had never appointed or

alienated the estate, but had died being tenant in tail in equity or tenant in fee in equity, the husband would have had an estate by the curtesy, whether the estate of the married woman was merely equitable without the separate use, or whether it was equitable together with the separate use; and my reason for saying so on principle is this, that with one notable exception familiar to conveyancers, that of dower, in the incidents of estates equity follows the law, and that would therefore give to the husband the same estate by the curtesy in his wife's equitable estate as he would have in her legal estate. There was no reason to the contrary. When the wife died intestate — for that is the assumption — her husband would take something, and her eldest son would take something, and they would be both equitably entitled. As I said before, there was no reason why that disposition should be altered in any degree. The wife's property would descend to her eldest son, subject to the husband's estate; there equity followed the law; but then came the separate use of the wife, which engrafted something on the equitable estate; it took away from the husband the right to receive the income during the coverture, or, as it was called, the equitable estate during the coverture; it gave the wife the absolute ownership during the coverture, and if the separate use attached also to the capital, it gave her the right of disposing of it either by deed or will irrespective of the husband.

“It therefore appears to me that to carry that out, the right to the separate use entitled her to dispose of it as much against the husband's estate by the curtesy as against the son's estate as heir. It enabled her to make a pure and clear disposition of it, and in that way it was wholly independent of the husband. But that is no reason for carrying it a step beyond. The separate use, if I may say so, is exhausted when the wife has died without making a disposition. She enjoyed the income during her life, and she has not thought fit to exercise that which was an incident of her separate estate, the right of disposing of her property. Why should equity interfere further with the devolution of the estate? Why should it say, I prefer the eldest son to the husband, who had a right at law of succeeding during his life, so to speak, to the estate which had become vacant by the death of the wife? I can see no reason on principle; and therefore it appears to me, if you decide on principle only, you will come to this conclusion, that where a wife, either by deed *inter vivos* or by will, disposes of the fee-simple settled to her separate use, that disposition takes effect free from any claim of the husband or the eldest son or other heir-at-law; but that where she dies without making any such disposition, the rights of the husband and rights of the heir are equally unaffected, and equity ought to follow the law.”

An alienation of her inheritance by the wife, either by deed or will, deprives the husband of his curtesy. *Cooper v. McDonald*, 7 Ch. D. 288; *Pool v. Blakie*, 53 Ill. 495; *Steward v. Ross*, 50 Miss. 776.

It has been maintained by certain authorities that an express intention by the creator of the separate use to exclude the husband from curtesy is sufficient to bar his claim. *Morgan v. Morgan*, 5 Mad. 408 (*semble*); *Stokes v. McKibbin*, 13 Pa. 267 (*semble*); *Rigler v. Cloud*, 14 Pa. 361. But this view is fully met by the following observations of Mr. Lewin in his *Treatise on the Law of Trusts* (7th ed.), p. 629: “It was observed by Sir John Leach that at law the husband could not be excluded from the enjoyment of property given to or settled upon the wife, but in equity he might, and that not only partially, as by a direction to pay the rents and profits to the separate use of his wife during coverture, but wholly by a direction that upon the death of the wife, the inheritance should descend to the heir of the wife, and that the husband should not be entitled to be tenant of the curtesy: *Morgan v. Morgan*, 5 Mad. 411; but this doctrine may admit of question, as there appears no reason why a person should be able to exempt equitable any more than legal estates from the ordinary incidents of property. A declaration, for instance, by a settlor,

that a trust should be inalienable or not available to creditors would be absolutely void. In the case of *Bennet v. Davis*, 2 P. Wms. 316, which is cited by Sir J. Leach for his position, the question discussed was not whether curtesy attached on an equitable estate, but whether an equitable estate arose. A testator had devised lands to his daughter, the wife of Bennet, for her separate use, exclusive of her husband, to hold the same to her and her heirs, and that her husband should not be tenant by the curtesy, nor have the lands for his life in case he survived, but that they should upon his wife's death go to her heirs. It was contended that the wife could not be a trustee for herself, and that the husband could not be a trustee for the wife, they both being one person, and that, consequently, as there was no trustee, the husband was entitled to the estate beneficially. But the court held that the husband was a trustee for the wife, and observed: 'Though the husband might be tenant by the curtesy (viz. of the legal estate), yet he should be but a trustee for the heirs of the wife.' The remark certainly implies that on the death of the wife the husband would not be tenant by the curtesy of the equitable estate; but that question had not been adverted to at the bar, and apparently, from the context, was not under the consideration of the court. Even assuming the remark to have been made advisedly, the view of the court may have been that the curtesy of the husband was excluded on the ground now overruled, viz. that the trust being not simply for the wife and her heirs but during the coverture for the separate use of the wife, and after her death for her heirs, there was not a sufficient seisin as regarded the husband for the curtesy to attach upon. See *Hearle v. Greenbank*, 3 Atk. 715, 716; *Morgan v. Morgan*, 5 Mad. 408."—ED.

SECTION VIII. (*continued.*)(c) RIGHTS OF A HUSBAND IN HIS WIFE'S TRUST PROPERTY DURING COVERTURE.¹

SIR EDWARD TURNER'S CASE.

IN CHANCERY, IN THE HOUSE OF LORDS, TRINITY TERM, 1681.

[*Reported in 1 Vernon, 7.*²]

MEMORANDUM; that about Michaelmas last it was adjudged in an appeal in the House of Lords, in the case of Sir Edward Turner, that a term being assigned in trust for a *feme* by her former husband, and she afterwards intermarrying with the late Lord Chief Baron Turner, who aliened the term, that the same was well passed away, and that the husband might dispose thereof; and my Lord Chancellor's decree was thereupon reversed.³ But it was agreed, that where a term is assigned in trust for a *feme* by the privity and consent of her husband, there without doubt the husband cannot intermeddle or dispose of it.

¹ The cases relating to the "Separate Use" and "Equity to a Settlement" of a married woman will be collected in a subsequent chapter.—ED.

² 4 Hare, 3, n. (b), s. c.—ED.

³ Wikes's Case, Lane, 54; 1 Roll. Abr. 343, s. c.; Bullock v. Knight, 1 Ch. Ca. 266; Pitt v. Hunt, 1 Vern. 18; Sanders v. Page, 3 Ch. Rep. 223; Packer v. Wyndham, Prec. Ch. 418, 419; Roupe v. Atkinson, Bunb. 162; Jewson v. Moulton, 2 Atk. 417, 421; Incedon v. Northcote, 3 Atk. 430, 435; Macaulay v. Phillips, 4 Ves. 15, 19; Franco v. Franco, 4 Ves. 515, 528; Mitford v. Mitford, 9 Ves. 87, 98; Donne v. Hart, 2 Russ. & M. 360; Hanson v. Keating, 4 Hare, 1; Duberley v. Day, 16 Beav. 33, 41.

In Duberley v. Day, Sir J. Romilly, M. R., said, p. 41: "It is quite settled, that at law a husband may dispose of the wife's term which is vested in him, whether the wife's beneficial interest in it is to arise hereafter or immediately. In Donne v. Hart, 2 Russ. & M. 360, the Master of the Rolls [Sir John Leach], decided, that there is no difference in equity between the legal interest in a term and the trusts of a term, and held, that the assignment by the husband of the reversion of the wife in a chattel real was a good and effectual disposition of it, and bound the wife who survived the husband." In the case before him, the learned judge decided that the husband had not the power to dispose of the trust term of the wife, inasmuch as by the limitations to her it could not in any event vest in possession during the life of the husband.

The husband's rights in the trust property of his wife in lands of freehold or inheritance are well stated in the following extract from Lewin's Trusts (7th ed.), 640: "The case of the wife's equitable estate in lands of freehold or inheritance, presents in the main the same general similarity to the case of her legal estate in like lands, as has been noticed in respect of chattels real. Thus the husband without the wife can, in the case of the equitable as in that of the legal interest, convey an estate for the joint lives of himself and his wife, (a) or for his own life after issue born. So he and his wife conjointly can, by deed acknowledged by the latter under the Fines and Recoveries Act, dispose of the equitable and of the legal interest; and can bar an equitable entail as they might a legal entail, by deed enrolled in chancery."—ED.

(a) As to the legal estate, see Robertson v. Norris, 11 Q. B. 916.

PURDEW v. JACKSON.

IN CHANCERY, BEFORE SIR THOMAS PLUMER, M. R., DECEMBER 19,
22, 1823; FEBRUARY 3, 5, 1824.

[*Reported in 1 Russell, 1.*]

THE MASTER OF THE ROLLS. The property in question is a moiety of one-seventh share of a fund¹ in court, which Mrs. Bolton was entitled to have transferred to her upon the death of Isabella Purdew. In October, 1812, she and her husband, who was then a prisoner for debt, transferred, for valuable consideration, this moiety to Rose. In the assignment Bolton contracted that, immediately after the death of Isabella Purdew, Rose should have the right to demand and sue for this personal chattel in the name of Mr. and Mrs. Bolton, or either of them, and that in the mean time his life should be insured. Bolton died in 1819, in the lifetime both of Isabella Purdew and Mrs. Bolton. The tenant for life being now dead, Rose insists upon his right under the assignment; and that raises the general question, whether, where the wife has an interest in reversion or remainder in a personal chattel, expectant on the death of another person, and the husband assigns this interest for valuable consideration, and dies before the determination of the life-estate, the right of the surviving wife is barred.

I shall first examine this question as if it were new, and as yet untouched by authority. In that way of considering it, there are two points which deserve attention: first, what is the nature of the legal right of the husband in a personal chattel to which the wife is entitled in reversion or remainder? Secondly, has the person, to whom for valuable consideration the husband assigns a chattel so circumstanced,

¹ The fund consisted of bank annuities which, by the direction of a testator, had been purchased in the name of the defendant Jackson, as trustee. The dividends were payable to the plaintiff, Isabella Purdew, during her life, and after her death to the children of her deceased daughter, Sarah M'Dougall. Mrs. Bolton was one of those children. The suit was instituted by Isabella Purdew and her grandchildren to have the trusts of the will executed. By a decree of June 26, 1806, it was ordered that the bank annuities should be transferred to the accountant-general, to the credit of the cause, upon the trusts of the testator's will. The indenture of assignment between Mr. and Mrs. Bolton and Rose bore date October 10, 1812. Thomas Bolton died in October, 1819. Isabella Purdew died in September, 1822. Mrs. Bolton then presented a petition that her share of the stock might be assigned to her. Rose presented a counter petition, claiming under the assignment of 1812.

The preceding abstract of the facts of the case, together with a portion of one of the opinions of the Master of the Rolls, will be found sufficient for an understanding of the case. The case, with its two arguments and three opinions, occupies seventy-one pages in Russell. — *Ed.*

the same right with his assignor, or has he a different and a better right?

What is the universal and admitted principle of the law of England, which governs the choses in action of a married woman, and determines what is to be the effect of the marital right of the husband in them? I shall state the doctrine as I find it laid down in Mr. Roper's treatise on the Law of Husband and Wife: "Marriage is only a qualified gift to the husband of his wife's choses in action, viz. upon condition that he reduce them into possession during its continuance; for, if he happen to die before his wife, without having reduced such property into possession, she, and not his personal representatives, will be entitled to it."¹ Such is the proposition with which that respectable writer sets out in impeaching the authority of the decision in *Hornsby v. Lee*. What then is meant by a chose in action? The terms "chose in action" and "reduced into possession" are legal phrases, not borrowed from a court of equity, but derived from the language and the doctrines of the common law; and in dealing with them it is of importance that we should confine ourselves strictly to the subject before us, — a personal chattel, — and not perplex ourselves with principles applicable only to real property. The right of property in a personal chattel is inseparable from the possession; the law of England does not know such a thing as the possession of a personal chattel being in one man, unless by the authority of the rightful owner, while the right of property is in another. If you have not the possession, you may have an immediate right of action; but till you recover the possession of the chattel, you have not the right of property. When it is reduced into possession, the property in it vests and not before; for the property in a personal chattel does not become complete till possession is obtained. Therefore the law of England, speaking of the different sorts of property which a married woman may have, and designating a chose in action to be a mere right of action to a personal chattel not in actual possession, holds, that the husband must, as a condition without the fulfilment of which he does not acquire a right to it, reduce the thing into possession; that is, he must make the property his own, for, without possession, the property is not his; he has only a right of action, which will ultimately belong either to himself or to his wife, according as the one or the other may happen to survive. Now, in 1812, the property in question was, strictly speaking, a chose in action: it was not, it could not be, in possession; not only was it not in possession, but there was not even a present right of action; the right of action was future, and would necessarily remain so, till the death of Isabella Purdew. The thing belonging to the wife was, therefore, a personal chattel, legally

¹ Roper's Law of Husband and Wife, i. 202.

denominated a chose in action, as contradistinguished from a chattel reduced into possession.

The next question is, what is the effect of the assignment? A great deal of fallacy has been introduced into this part of the argument from not considering that an assignment makes no alteration in the thing transferred. When the husband has assigned the wife's chose in action, does the thing assigned continue to be a chose in action? or does it become a personal chattel in possession? If it does not continue after the transfer to be a chose in action, what makes it cease to be so? A chose in action cannot cease to be a chose in action, except by being reduced into possession; but it would be a contradiction in terms, in the very statement of the case, to say, that this fund, which could not be reduced into possession till 1822, was reduced into possession in 1812. During these ten years the right to it might pass from one person to another; an assignment of it might be made in equity, which would have a certain effect; but the nature and character of the thing itself could not be changed. It is in vain to talk of Bolton's assignment as being a constructive reduction into possession. In cases where there is a present right, and an assignment of it is immediately followed by possession of the thing, the assignment, being the commencement of that immediate actual possession, may be regarded as a kind of constructive possession. But to say that the assignment of a chose in action, which is at the time incapable of being reduced into possession, is to be construed as a reduction of it into possession, is to ascribe to the assignment the effect of totally transforming the nature of the thing assigned. Up to the time of Isabella Purdew's death, the thing which Bolton assigned continued to be a chose in action; while it was in that state, Bolton died without having fulfilled, without having been able to fulfil, the condition on which alone the law gives the husband the choses in action of the wife; therefore, the legal right of the wife now attaches upon it; and if a court of equity were to take it from her, equity would not follow, but would oppose the law. The wife is entitled by the law to take the chance of outliving her husband; and it is the law which says, that, if she survives him, the choses in action which were formerly hers shall continue to belong to her. That is the clear legal doctrine; and there is nothing in equity to modify or alter it. On this subject equity invariably follows the law. Even where a chose in action of the wife is sought to be bound by a decree in equity, if the husband dies before the thing ceases to be a chose in action, that is, before there is an order for the payment of the money, the consequence in equity is precisely the same as it is at law, under analogous circumstances; the surviving wife is entitled. *Nanney v. Martin*.¹ Her title in such cases is not a creature of this court; it is not a mere matter of

¹ 1 Cases in Chancery, 27.

practice or regulation here ; it is the wife's positive legal right, the result of a fixed rule of law.

Where the wife has an interest in a personal chattel, by way of remainder, expectant upon the life-estate of another, in whose name, after the death of her husband and of the tenant for life, is the action for the recovery of it to be brought? Clearly in the name of the wife alone. It is manifest, therefore, that she has the sole legal right. Then, when she, by force, not of any equitable right, but of a legal right derived from her original title, unaffected by the marriage, has recovered at law, on what principle can a court of equity take from her the benefit of her judgment?

What equity is there to qualify her legal right, or to deprive her of it? The acts of the husband can create no such equity ; for the law has said that his acts shall not affect the wife's chose in action, unless he reduce it into possession. In this view of the matter, it seems to me that I should alter a most important part of the law of England if I were to put it in the husband's power, where he cannot reduce the wife's choses in action into possession, to affect directly or indirectly the consequences attaching upon the wife's legal title by survivorship.

Arguments have been adduced to prove that an assignment may be made by the husband of the wife's chose in action, while it is in expectation or remainder, and that such an assignment is valid in equity. Undoubtedly it is ; and though his assignment will not prevail against the wife's right by survivorship, it does not follow that it is therefore void and without effect : it may still be, and it is (to use Lord Hardwicke's words) " though void at law, good in equity ;" it gives the assignee the chance of the husband living till the property falls into possession.

An assignee, it is said, obtains in some cases a better right than his assignor had. There may be cases of that kind ; but is there any case in which the court has interposed in favor of an assignee, though for a valuable consideration, who had notice of the actual right of the assignor and of the interest of a third person in the property, to take from that third person the legal right of which the assignee had notice? Did not Rose know, that, if Bolton died before Isabella Purdew, the property would be the wife's? and did he not accordingly covenant for the insurance of Bolton's life? He bought the property subject to the chance of what has happened. There is not a pretence for saying that he bought of the husband more than the husband possessed.

After this repeated consideration of the subject, I still continue of opinion, that all assignments made by the husband of the wife's outstanding personal chattel, which is not or cannot be then reduced into possession, whether the assignment be in bankruptcy, or under the insolvent acts, or to trustees for the payment of debts, or to a purchaser

for valuable consideration, pass only the interest which the husband has, subject to the wife's legal right by survivorship.

Rose's petition was dismissed; and an order was made on the petition of Mr. and Mrs. Lenthall for payment of the fund according to their prayer.¹

WIDGERY v. TEPPER.

IN THE COURT OF APPEAL, BEFORE SIR W. M. JAMES, SIR R. BAGGALLAY, AND HON. H. H. THESIGER, LL. J., DECEMBER 6, 7, 1877.

[*Reported in 7 Chancery Division, 423.*]

THIS was a suit by the personal representatives of John Widgery to set aside a sale by him of a share to which his wife had been entitled as one of the five next of kin of J. M. W. Turner, R. A., in certain engravings.

By a decree made in 1856, it was declared that the engravings in question belonged as to one-fifth to J. Widgery and M. A. Turner, his wife, in her right, and as to the other four-fifths to the four other next of kin in equal shares, and it was ordered that they should be delivered to Jabez Tepper on behalf of the next of kin, he being one of such next of kin and acting as the solicitor in the suit for the others. The engravings were delivered to him accordingly.

In January, 1858, Jabez Tepper proposed to the persons entitled to the other four shares in the above engravings, to purchase their shares, the price of each share to be £500, in addition to which the vendor of each share was to have six of the engravings. Three of the next of kin, including Widgery and his wife, accepted the offer and received the prices of their shares, but the six engravings to each were not delivered. The persons entitled to the remaining fourth share declined to accept the offer. The engravings remained in the possession of Jabez Tepper till his death, which took place in 1872.

Widgery died in 1861. His wife survived him, and died in 1871.

In January, 1872, a creditor's suit, *Turner v. Turner*, was commenced

¹ *Hornsby v. Lee*, 2 Mad. 16; *Honnor v. Morton*, 3 Russ. 65; *Stiffe v. Everitt*, 1 M. & Cr. 37; *Ellison v. Elwin*, 13 Sim. 309; *Harley v. Harley*, 10 Hare, 325; *Ashby v. Ashby*, 1 Coll. 553; *Baldwin v. Baldwin*, 5 De G. & Sm. 319, *accord*.

Conf. Hamilton v. Mills, 29 Beav. 193.

On the same principle the equitable interest of a wife in a chose in action cannot be taken from her by the act of her husband if it has not been reduced to possession before a dissolution of the marriage or a judicial separation. *Heath v. Lewis*, 4 Giff. 665; *Re Insole*, 35 Beav. 92; *Prole v. Soady*, L. R. 3 Ch. Ap. 220; *Swift v. Wenman*, L. R. 10 Eq. 15. — Ed.

for the administration of the estate of Jabez Tepper, and in the same month a decree was made for administration, which contained an inquiry of what Jabez Tepper's estate consisted, and an inquiry whether his estate was subject to any liability to the parties interested in the estate of J. M. W. Turner, in respect of his occupation of a leasehold house of Turner's and the engravings or property therein. The engravings thus referred to were the engravings in question. On the 18th of June, 1872, an inquiry was added, what interest Jabez Tepper had in the engravings, &c., in his possession at the time of his decease, formerly part of the estate of J. M. W. Turner, and, if interested as owner, to what extent, and whether he became such owner as trustee, or legatee, or purchaser, or otherwise, and who were then the persons interested therein. The decree was served on Widgery's executors as interested in respect of the six engravings, which were of considerable value.

On the 9th of August, 1872, an order was made in *Turner v. Turner*, at the making of which Widgery's executors were represented, by which it was, among other things, ordered that six engravings, to be selected by the chief clerk from among the above engravings, should be delivered to Widgery's executors in satisfaction of all claim by them for non-delivery of six engravings in part payment for the share of Widgery in right of his wife in the engravings sold to Jabez Tepper. Early in 1873 the plaintiffs received the six engravings accordingly, and gave a receipt for them.

On the 20th of February, 1873, the chief clerk made his certificate in *Turner v. Turner*, whereby he certified that Jabez Tepper was at his death entitled to the engravings; as to four-fifths thereof beneficially, subject to the delivery of six engravings to each of the next of kin who had sold their shares, and as to the remaining fifth, as a trustee for the representatives of that one of the next of kin whose share had not been sold; and he proceeded to certify further that the six engravings had since been delivered.

On the 8th of March, 1873, the cause of *Turner v. Turner* came on for further consideration, Widgery's executors appearing, and an order was made declaring Samuel Tepper entitled to the whole of the personal estate of Jabez Tepper, and authorizing a sale of the engravings.

The above orders were enrolled.

The engravings were sold accordingly at different times from March, 1873, to March, 1874, and realized a gross amount of £35,862. In April, 1874, the bill in this cause was filed to impeach the sale to Samuel Tepper as regarded Mrs. Widgery's share.

The defendants, by their answers, insisted, among other things, that as the wife had survived the husband, her representatives, and not his, were the proper parties to impeach the sale, and that even if the plain-

tiffs had a *locus standi*, the enrolled orders in *Turner v. Turner* debarred them from relief. Vice-Chancellor Malins overruled these objections, and made a decree in favor of the plaintiffs.¹ From this decree Tepper's executors and Mrs. Widgery's executors appealed.

Glasse, Q. C., and *Bristowe*, Q. C., *C. H. Turner*, and *T. A. Roberts*, for the appellants, on the question as to the *locus standi* of the plaintiffs, cited, in addition to the authorities referred to below, *Harwood v. Fisher*.²

J. Pearson, Q. C., and *W. Karslake*, for the respondents, were not called upon.

JAMES, L. J. In my judgment this is a clear case. Certain chattels were delivered to Tepper on behalf of himself and the other next of kin, of whom Mrs. Widgery was one. Mr. Widgery sells to Tepper his wife's share of them, and receives the purchase-money. If reduction into possession of chattels of this kind is necessary, there was here a clear reduction into possession.

BAGGALLAY, L. J. I am of the same opinion, and entirely concur in the reasons given by the Vice-Chancellor in his judgment.

THESIGER, L. J., concurred.

The argument then proceeded on the merits, and in the result the appeal was dismissed with costs.³

¹ 5 Ch. D. 516.

² 1 Y. & C. Ex. 110.

³ *Murray v. Elibank*, 10 Ves. 84, 90 (*semble*); *Osborn v. Morgan*, 9 Hare, 432; *Murphy v. Grice*, 2 Dev. & B. (Eq.) 199, *accord*.

In *Osborn v. Morgan*, *supra*, Sir G. J. Turner, V. C., said, p. 433: "Marriage is a gift to the husband of all the personal property to which the wife is entitled in possession, and of all the personal property of which she may become entitled, subject only to the condition of reducing it into possession during the coverture; and I am aware of no distinction in this respect between property to which the wife is entitled in equity, and property to which she is entitled at law. Nor upon principle can there be any such distinction, the rule resting as I conceive upon this, — that the husband and wife are in law one person, — a rule which prevails in equity as much as at law." See also *Lewin Trusts* (7th ed.), 632.—ED.

SECTION IX.

The Descent of Trust Property.

ANONYMOUS.

IN THE —, MICHAELMAS TERM, 1465.

[Reported in Year Book, 5 Edward IV., folio 7, placitum 16.]

IF J. enfeoffed A. to his use and A. enfeoffed R., although he sold the land to him; if A. gave notice to R. of the intent of the first use, he is bound by writ of subpœna to perform the will, &c. But if tenant in borough-English enfeoffed one to the use of him and his heirs, the youngest son shall have the subpœna and not the heir general; ¹ likewise if a man makes a feoffment in trust of land descended to him on the maternal side and dies without issue, the heir *ex parte materna* shall have the subpœna. ²

¹ Y. B. 21 Ed. IV. fol. 24, pl. 10; Y. B. 27 Hen. VIII. fol. 9, pl. 22; *Jones v. Reasbie*, 2 Roll. Abr. 780, pl. 7; *Fawcet v. Lowther*, 2 Ves. Sen. 300, 304 (*semble*); *Banks v. Sutton*, 2 P. Wms. 713 (*semble*), *accord.* — Ed.

² *Burgess v. Wheate*, 1 Eden, 186, 216, 256; *Langley v. Sneyd*, 1 S. & S. 45, 55; *Nanson v. Barnes*, L. R. 7 Eq. 250, *accord.*

In *Banks v. Sutton*, 2 P. Wms. 700, Sir J. Jekyll, M. R., said, p. 713: "That trusts and legal estates are to be governed by the same rules is a maxim that obtains universally; it is so in the rules of descent, as in gavelkind and borough-English, there is a *possessio fratris* of a trust as well as a legal estate (*a*); the like rules of limitation (*b*), and as also of barring entails of trusts (*c*), as of legal estates." — Ed.

(*a*) *Chudleigh's Case*, 1 Rep. 121 *b*; *Brown's Case*, 4 Rep. 22 *a*; *Wimbish v. Tailbois*, Plowd. 58; *Cunningham v. Moody*, 2 Ves. 174; *Buchanan v. Harrison*, 1 Johns. & H. 662, *accord.* — Ed.

(*b*) *Brydges v. Brydges*, 3 Ves. Jr. 120, 127; *Re White*, 7 Ch. D. 201, *accord.* — Ed.

(*c*) *Goodrick v. Brown*, Freem. C. C. 180; *Washbourn v. Downes*, 1 Ch. Ca. 213; *Brydges v. Brydges*, 3 Ves. Jr. 120, 127; *Wykham v. Wykham*, 18 Ves. 418, *accord.* — Ed.

SECTION X.

Forfeiture and Escheat of Trust Property.

ANONYMOUS.

IN THE —, MICHAELMAS TERM, 1465.

[*Reported in Year Book, 5 Edward IV., 7, placitum 18.*]

If there are lord and tenant, and the tenant enfeoffs one without declaring his will and commits a felony, *quære*, who shall have the subpcena, for the lord shall not have it.¹

THE KING v. THE EXECUTORS OF SIR JOHN DACCOMBE.

IN THE EXCHEQUER, MICHAELMAS TERM, 1618.

[*Reported in Croke's James, 512.*]

KING JAMES made a lease to Sir John Dacombe and others, of the provision of wines for his Majesty's house for ten years, in trust for the Earl of Somerset. They made a lease for all the term except one month, rendering nine hundred pounds a year. The Earl of Somerset being afterwards attainted of felony, the question was, whether the trust which was for the said earl was forfeited to the king by this attainder. And it was referred to all the justices of England, by command from the king, to be considered of, and to certify their opinions.

TANFIELD, Chief Baron, now delivered all their opinions to be, that this trust was forfeited to the king, and that the executor shall be compelled in equity to assign the residue of the term and the rent to the king. And he cited a case to be adjudged, 24 Eliz., where one Birket had taken bond in another's name, and was afterwards outlawed, that the king should have this bond; and that in 24 Eliz. one Armstrong, being lessee for years, assigned the lease to another in trust for himself, and being attainted of felony, this trust was forfeited to the king. But

¹ "At common law *cestui que use* did not forfeit the use for felony or treason; for it is only a confidence; it is so at this day for a trust of a freehold or inheritance; but it is otherwise of a chattel. A feoffee upon trust at this day commits treason or felony; the land is lost and escheats and the trust is extinct; for the king or lord by escheat cannot be seised to a use or trust; for they are in the *post* and are paramount the confidence." Jenk. Cent. Cas. 190. — ED.

he said they all held, and so it was resolved in another case, that a trust in a freehold was not forfeited upon attainder of treason.¹ *Note*, This case I had from the report of Humphrey Davenport, who was of counsel in this case.²

KING'S ATTORNEY v. SIR GEORGE SANDS.

IN THE EXCHEQUER, EASTER TERM, 1669.

[*Reported in Freeman, Chancery Cases*, 129.³]

SIR RALPH FREEMAN purchased a lease for years of several manors ; afterwards he purchased the inheritance thereof, in the name of Sir George Sands, being his son-in-law, in trust for Sir Ralph and his heirs ; afterwards Sir Ralph made his will, and made Mr. Freeman his executor, and appointed that his said executor and Sir George Sands should convey part to Freeman Sands, and part to George Sands, the two sons of Sir George Sands, and their heirs ; the residue to all the sons of Sir George Sands, by his then lady (Sir Ralph's daughter), and their heirs, who should be living at the time of his death, and then died. Sir George Sands, at the time of the death of Sir Ralph, had only Freeman Sands (who soon after died without issue) and the said George Sands ; but afterwards Sir George had issue another son, called Freeman Sands. Mr. Freeman, the executor, refused the executorship, whereupon administration was granted to Sir George Sands ; afterwards, no conveyance being made either of the lease or of the reversion by Sir George Sands, who had both in trust, according to the will, Freeman Sands killed George, his brother, and was afterwards attainted of murder.

The question was, whether any of those trusts, either of the lease or of the reversion, that were so in Sir George, in trust as aforesaid, were forfeited to the king, of whom the lands were holden, by this felony and attainder ; who, by the king's attorney, sued Sir George on the equity side of the Exchequer, to answer the profits to the king, supposing those trusts to be forfeited by the felony and attainder.

The case was several times argued at the bar, and this term Chief Baron Hale and Baron Turner (Rainsford being removed into the King's Bench, and Atkins disabled by age) both agreed that this trust was not forfeited.

¹ But see *Lewin Trusts* (7th ed), 693. — ED.

² *Wike's Case*, Lane, 54 ; *Att'y-Gen. v. Sands*, Hard. 405 ; *Pawlett v. Att'y-Gen.*, Hard. 467 ; *Sir J. Dack's Case*, Aleyn, 16 ; *Re Thompson's Trusts*, 22 Beav. 506 *accord.* — ED.

³ Nels. 130 ; 3 Ch. Rep. 3^a ; Hard. 405, 488, s. o

In their arguments it was agreed, *cestui que trust* in fee, or fee tail, forfeit the same by attainder of treason,¹ and the estate to be executed to the king in a court of equity, by 27 H. VIII. 10, and 33 H. VIII.²

2. An alien *cestui que trust* of any estate, the estate belongs to the king; which, the Chief Baron said, was the opinion of the judges in Holland's Case,³ 23 Car. I.; and that an alien cannot purchase but for the king's use, and that he was of counsel in the case. See the case reported in Style, 20, 40.

3. As to the king's debt, by the common law, and by the practice of this court, which is of the common law, *cestui que trust* being indebted to the king, the king shall have execution of his debt on this trust; for before the statute made, 4 H. VII. 17, and 19 H. VII. 5, in the time of H. VI., there be precedents in this court, that the writ of *extendi fac.* for the levying of the king's debt, was of the debtor's land, or of any other land of which any other person was seised to his use; and this was the reason of Sir Edward Cooke's Case,⁴ where the interest of the king's debt did attach upon the power of the king's debtor to revoke a settlement made of his estate; and Pasch. 4 Jac. Ford's security, taken in trust for a recusant, was liable to the king's debt of £20, per North; so that where the king's debtor hath the profitable part of the estate, the king shall not lose his debt by any fiction.

4. It was agreed that the trust of the reversion would not be forfeited by felony;⁵ which the court held clear, and cited for authorities Marquis of Winchester's Case;⁶ 12 Co. 1, 2; 5 Ed. IV. 7; 2 Cro. 513; Stat. 33 H. VIII. And if the inheritance be forfeited for felony, it must be to the lord by escheat, which cannot be, because he hath *cestui que estate* for his tenant; and that no trust of an heir is forfeited for felony, appears by 27 H. VIII. 10, and there is no wrong to the lord as long as he hath a tenant, and therefore till the statute of 19 H. VII. 15, the lord could not seise the lands of which his villein was *cestui que*

¹ In the King v. Lord Nottingham, Lane, 45, it is observed, "It would be inconvenient that the same land should be subject to several forfeitures, at the same time, by several men;" and it has been declared, subsequently to the present case, and in opposition to the dictum in the text, that the trust of a freehold is not forfeited to the crown by the *cestui que trust* being attainted of treason: The King v. The Executors of Sir John Dacombe, Cro. Jac. 513; though, in the same case, it was adjudged that *cestui que trust* of a chattel interest, upon attainder of felony even, forfeits the same to the crown.

² It should be observed that the case of The King v. Dacombe, cited in the last note, was decided subsequently to both these statutes; and see the earlier case reported in Jenkins, p. 190.

³ Aleyn, 14.

⁴ 2 Rolle's Rep. 294. But a simple-contract debt to the crown will not bind the land of the debtor in the hands of a *bona fide* purchaser. The King v. Smith, Wightw. 34; Casberd v. Attorney-General, 6 Price, 474.

⁵ Burgess v. Wheate, 1 Eden, 252.

⁶ 3 Co.

trust; and if it be demanded what shall become of his trust, as if tenant in fee of a rent-charge dieth without heir, it is answered, the land shall be discharged of this trust, as if tenant in fee of a rent-charge die without heir, or be attainted, the land is discharged.

Trust of a lease for years in gross may be forfeited by felony, or outlawry in a personal action. Earl of Somerset's Case;¹ Dacomb's Case; Balington's Case.

Lease for years, if it be of never so long continuance, if it be assigned in trust for J. S. and his heirs, yet it shall go to his executors; yet trusts are ruled according to the style and course of courts of equity.

A real chattel in law survives to the husband, but not the trust,² of a real chattel. Co. Lit. Cap. Remit. 351.

Cestui que trust of an inheritance binds himself and his heirs in a bond, this trust is not assets to the heir; though it hath since been questioned³ in the Lord Chancellor Hyde's time: but clearly the trust of a lease for years is assets to charge an executor in equity.

So a trust assigned over to wait upon the inheritance, though of a term, shall go to the heirs, and heirs of the body, because a shadow kept on foot for a special purpose; and this hath a great resemblance to the case of charters, which go with the inheritance to the heir, but if granted over, the parchment and wax shall go to the grantee and his executors. 4 H. VII. 10.

And in the present case no trust of the chattel is forfeited to the king, because the lease for years was not in Freeman, who was attainted of felony, nor the trust in him as a chattel, for that he must have been executor and administrator of George, the son.

And here it was Sir Ralph's intent that the lease and inheritance should be confounded, and not kept separate; and again, Freeman could have this trust but as heir to George, and as long as he hath the inheritance in him, and no longer, but it shall go to the heir as charters,⁴ *nomine pænæ*, patronage by foundryship, &c.; and the mischief otherwise would be great, to have such waiting terms forfeited by outlawry. And so judgment was given against the king's attorney.

¹ Hob.

² See Freem. C. C. c. 32, p. 29, note 3.

³ It is now put beyond question by the Statute of Frauds, 29 Cha. II. c. 3, by the tenth section of which a trust of an estate in fee-simple is made legal assets. The trust of a term is, usually, equitable assets: Sir Charles Cox's Case, 3 P. Wms. 341; but where it is a term attendant on the inheritance, it is, in truth, a part of such inheritance, and, like it, legal assets. Ratcliff v. Graves, 2 Ch. Ca. 152.

⁴ Strode v. Blackburne, 3 Ves. 226.

BURGESS v. WHEATE.

IN CHANCERY, BEFORE LORD HENLEY, K., LORD MANSFIELD, C. J.,
AND SIR THOMAS CLARKE, M. R., JANUARY 24, 1759.

[Reported in 1 *William Blackstone*, 123.]

LORD KEEPER.¹ There is one objection, and two claims, upon which I am now to give my opinion. I agree with the Lord Chief Justice and his Honor, as to the objection.

As to the other points, I think myself very much obliged to Lord Chief Justice and his Honor, and return them my thanks for their learned assistance, and their free and unreserved communication of their sentiments to me, during all the time that this matter has been under consideration.

I. First, I shall take notice of the claim of the crown, because several of the arguments I shall make use of on that, will tend to support the opinion I shall give on the other claims. The question on the information is, whether the *cestui que trust* dying without heirs, the trust is escheated to the crown, so that the lands may be recovered in a court of equity by the crown, or whether the trustee shall hold them for his own benefit. (States the case.) On 11 January, 1718, Mrs. Harding conveys to trustees (of whom Sir F. Page was the survivor) the lands in question, in trust for Mrs. Harding, her heirs and assigns, to the intent that she should appoint such estates thereout, and to such [persons] as she should think proper. Mrs. Harding dies without making any appointment, and without heirs *ex parte paterna*. The information charges that the trustee took no benefit, but only for Elizabeth Harding, and to be subject to her appointment; and that she being dead *sans* heirs on the father's side, and having made no disposition of the estate, that Sir F. Page could take no estate for his own benefit by the deed or the fine, but takes it for the benefit of his Majesty, who stands in the place of the heir, and that the premises are escheated to his Majesty. The question, therefore, is entirely a question of tenure, and not of forfeiture.

I shall consider, first, The right of lords to escheat at law. Secondly, Whether they have received a different modification in a court of equity. Thirdly, The arguments used in support of the information; and from the whole draw this conclusion, that the crown has in this case no equity.

1. I shall consider the law of escheat, as settled by the municipal

¹ The concurring opinion of Sir Thomas Clarke, M. R., and the dissenting opinion of Lord Mansfield, C. J., are omitted, on account of their great length. — Ed.

writers in the law, and reporters, and shall not regard what the law was in other countries, as they seem founded and calculated for empire and vassalage, to which I hope in this country we shall never be subject. I will just give a specimen of the feudal law. Craig, 504. *Causæ Amissionis Feudi*: These causes are, incestuous marriages, parricide, fratricide, friendship contracted with the lord's enemies, revealing the lord's secrets, if they affect his life or reputation, outlawry not reversed, and all other causes in the discretion of the prætor. I cite this to relieve me from the doctrine of the feudists. The legal right of escheat with us arises from the law of infeoffment to the tenant and his heirs, and then it returned to the lord, if the tenant died without heirs. The extension of the feoffment from the person of the tenant to the heirs special of his body, and then to his heirs and assigns, is accurately traced in a treatise of tenures by a learned hand: ¹ this reduces the condition of the reversion to this single event, viz. *Ob defectum tenentis de jure*. F. N. B. 337: A writ of escheat lies where tenant in fee of any lands or tenements holds them of another, and the tenant dies seised ² without heirs general or special, the lord shall have the land: because he shall have it in lieu of his services. The books are uniform, that in the case only of tenant's dying without heir, the escheat took place. As long as tenant or his heir, or, by his implied assent, another continued in possession by title, that prevented escheat. The law had no regard to the tenant's right to the land, but in right of his seisin. All these instances show that where there was a tenant actually seised, though he had no right to the tenements, and though the person who had the right died without heirs, yet the escheat was prevented. For if the lord has a tenant to perform the services, the land cannot revert in demesne. Roll. Abr. 816; Whittingham's Case; ³ 7 Hen. IV., Heir of Disseisor; 1 Inst. 268 b, Feoffee of Disseisor. Upon these cases I would observe, that the lord's consent had nothing to do with establishing the right of the tenant's being duly seised, because in every one of these cases they all come in without the lord's consent; unless it may be said that the lord is a virtual assenter, as well to the disseisins as the legal conveyances. And then, if that be so, it would operate to the

¹ Sir M. Wright.

² "The words of F. N. B. are so: but *vid.* F. N. B. 338 (C), in these words: 'And if the tenant be disseised, and afterwards dieth without heir, &c., it seemeth the lord shall have a writ of escheat, because his tenant died in the homage.' *Contra*, 32 H. VI. 27 a, pl. 16, and so cited in Com. Dig. *Escheat* (B 2); and the distinction there is, that if the tenant be disseised, the lord may enter, but not have a writ of escheat; but if the disseisor had died seised, the lord could neither enter nor have a writ of escheat, *ib.*; and it seems by the reasoning of the court, 32 H. VI. 27 a, that the lord can in no case have a writ of escheat, except where his entry was lawful. *Ibid.*" MS. Serj. Hill.

³ 8 Rep. 42 b.

establishing the right of the trustee here, who would say he is entitled under a conveyance in law, by the very consent of the lord ; which is a stronger case than a disseisin. From these cases and authorities it must be allowed to be settled, that the law did not regard the tenant's want of title, as giving the lord right to escheat.

2. The next consideration is, whether a court of equity can consider it in a different light. Now, when the tenant did not die seised, and a proper legal tenant by title continued, and consequently the lord's seignior and services continued, can this court say to the lord, Your seignior is extinguished, and to the tenant, Your tenancy is so too, though both are legal rights now subsisting at law ? In consideration of uses with regard to escheats, equity has proceeded on the same principle as the law, where there was a tenant of the land that performed the services. And I don't find this court had any regard to the *merum jus* of the tenant. Now, the reason why there was no escheat on the death of *cestui que use* in equity seems to be this (and it is a reason equally applicable to uses and trusts), that the court had nothing to issue a subpœna upon, no equity, nothing to decree upon ; and every person must bring an equity with him for the court to found its jurisdiction upon. It seems to me he could have no equity in the case of a use, or as owner of a trust, for this plain reason : a use before the statute could not be extended farther than the interest in the estate which the creator of the use could have enjoyed ; as if the creator of the use had a fee-simple in the land, he could take back no more interest in the use, either declared or resulting, than he had in the land ; if he makes a feoffment, and declares no uses, it results to him in fee, which is to him, his heirs and assigns. The consequence is, that the moment he dies without heirs or assigns, there was no use remaining. How, then, can you come here for a subpœna (whether he took back the same or a different use) to execute a use or trust which was absolutely extinct ? That seems to me the plain and substantial reason why, in this case (whether you call it a use or a trust), there was no basis on which to found a subpœna. Lord Chief Justice's system is very great and noble, and very equitably intentioned ; such a system as I should readily lay hold of upon every occasion, if I thought I could do it consistently with the rules of law.

What scintilla of equity is given to the lord ? Lord Chief Justice supposes, that by feoffment to two trustees for Mrs. Harding, her heirs and assigns, and for no other use, the lord is included in " her heirs and assigns." That expression cannot do so. I think the conveyance would have been the same if " assigns " had been left out. Then it is said, the express declaration is to her heirs and assigns, and that there is an implied trust on this ; for as the trustees are to take to no other use, and the express trust is served, therefore a trust in fee results to 'he lord, upon the

extinguishment of heirs *ex parte paterna*. To that conclusion I have two objections: 1. I think such a trust would, if declared, be entirely void (and whether declared by way of trust or use, it is the same thing); for when you have limited an estate to a man in fee, or declared the trust to him in fee, you have no more to dispose of in either case, and cannot limit one fee on another. It is said in answer to this, that she could not have limited it to Sir F. Page and his heirs in default of her own heirs, but that a person may limit anything according to the course of law, and there's a reverter to a person in fee in the course of law, therefore you may limit it so. But it reverts by operation of law on extinguishment of an estate that was a fee-simple incapable of any further limitation. The donor could not have limited it so. 2. With regard to the resulting trust there is this objection, which seems to me unanswerable. What is the estate conveyed to the trustees? It is Mrs. Harding's estate. Her husband and she are parties to the deed and fine. They pass all the estate that goes to the trustees. Can anything result by way of trust or use to a person not privy to the estate that passes by the deed? Where you have passed the estate without consideration, there in modern language a use results, or a trust results; because it is inequitable that a man should have an interest in the estate, when he has paid no consideration for it. But where a person is not party to a deed nor privy to the estate, I don't see how anything can result for his benefit. That this was the notion in respect to a use appears from authorities. The law was, that the lord could not have the escheat of a use. So is 5 Ed. IV., for I take that to be the report of a case; then it has all the authority the Year-Books carry with them. And this has been adopted by all the writers since. Bacon, 79, does not question the authority of this case. He gives a reason of his own, which he substitutes as a better than that in the books, that there is a tenant in by title, which is a strong reason in law; but it does not mention that as a reason with regard to the subpcena. It is not a conclusive reason, that the lord shall not have subpcena, because there is a person in possession. He should have it for that reason, if that person is liable to him in equity. Therefore he gives a better reason, because, says he, it never was his intent to advance the lord, but his own blood. Therefore that is the reason; it would not be within the intention of that trust, that any besides the blood of the covenantor should take. Nobody can imagine the tenant intended to provide a trust to answer the lord's escheat. Mrs. Harding never thought of escheat, I suppose; but had it been suggested to her, "If you die without heirs that can possibly take your estate, would you rather have your friend you have chosen to make your trustee take it, or that it should go to the king?" She must have been a subject of more zeal than I can suggest, if she had said she would give it to the king.

As I am now stating the law and equity of escheats with regard to uses and trusts, I will here take notice of an objection that seems equally to affect the opinions of lawyers, with regard to the doctrine of uses and trusts; and that is the dilemma which was urged at the bar, as the basis of the equity in the present case, though I don't think it a necessary dilemma, viz. that the lord must have the estate by escheat, either on the death of *cestui que trust* without heirs, or of the trustee without heirs discharged of the trust; but if he can't have it while the trustee lives, while there is a tenant, it would be monstrous that the *cestui que trust* should be prejudiced by putting the estate in the trustee's hands for the benefit of the family. One part of this is a dangerous conclusion, the other is not. My answer is, that if the law be so that the lord shall in that case take it discharged of the trust, I must suppose it no injury or absurdity at all. *Volenti non fit injuria*. The creator of the trust determines to take the convenience of the trust with its inconvenience. It is most certain, every man who creates a trust puts his estate in the power of his trustee. If the trustee sells it for a valuable consideration without notice, no court can relieve the owner from this misfortune: it is the result of his own act; and yet that is as shocking a perfidy in the trustee as can be; but the court cannot interpose, as it would affect the rights of others, of third persons. But I don't know it has been determined that it shall escheat, discharged of the trusts. I shall give no positive opinion upon it. So far I may say, that unless a trust can be distinguished from a use, the most learned judges say, the right comes as a reversion, failing heirs, and that the time of escheating is, when there is a want of a tenant, the right of the lord being paramount. The trust cannot be affected by it. Chudleigh's Case:¹ the lord comes in the *post* and not in the *per*.² Popham,³ s. c., says, that is the reason why the law is so, and I don't doubt the law. But there is no occasion to give a precise opinion upon it till necessary. But I don't think this is at all a necessary dilemma: the lord may not be entitled on death of *cestui que trust* without heir, because there is no equity, for he has his tenant as he had before. But possibly there might be an equity in the other case against the lord; for if trustee died without heir, and the lord had the estate, this court might say, You shall hold to compensate yourself for your rent and services, but we will embrace the rest for the *cestui que trust*.

A difference was attempted to be made between uses and trusts. I have seen trusts invented for the blackest purposes in my experience

¹ 1 Co. 122 a.

² The lord by escheat is *in* in the *post*; Harg. Co. Lit. 239 a, and [n. 156] *ibid*. As to the *per*, the *per et cui*, and the *post*, see F. N. B. 422, 467 (4to ed.); 3 Bl. Com. 181; and 1 Roscoe on Real Actions, 88.

³ 1 Co. Rep. 139 b.

and to subvert the very constitution of this kingdom. But this is nothing but the abuse of both. But to try if there is or is not any difference between them, the best way is to define both: as, in order to show the difference between one thing and another, 'tis usual to define the one and the other, and by comparing the definitions find the difference. Finch, l. 2, c. 22, fo. 22 *b*, says, A use is, where a man has anything to the use of another upon confidence, that the other shall take the profits. He who has the profits has a use. The other books say a use is neither *jus in re* nor *ad rem*, &c. Now, what is a trust? A confidence for which the party is without remedy, but in a court of equity. Lord Chief Justice does not state any difference in the metaphysical essence between a use and a trust, but that there was a difference in the law by which the one and the other was directed; and I think there is no difference in the principles, but there is a wide difference in the exercise of them. It was as much a principle of this court that the use should be considered as the land, or as imitating the land, formerly as now; though the rules were not carried formerly so far, nor the reasoning nor directions (when they were less understood) as at present. To give a [familiar] instance: The elements and principles of geometry were the same in Euclid's time as in Sir Isaac Newton's, though in the latter's time the use of them was much enlarged. It was said, the difference consists in this: that equity has shaped them much more into real estates, than before, when they were uses. As now there is tenancy *per curtesy* of a trust, they may be entailed; and those entails barred by a recovery. But why? Not from any new essence they have obtained, but from carrying the principle farther, *quia æquitas sequitur legem*: for as between the trustee and the *cestui que trust* this court had jurisdiction; and I think they should have equally extended in this court the rules and principles of uses as well as trusts. This, therefore, was the effect of the equitable jurisdictions growing to maturity. Lord Bacon says, they grew to credit and strength by degrees. He says, a use is nothing but a general trust, where a man will trust to the conscience of another, rather than to his own estate and possession.

That a use and trust are the same, seems adopted by all the great persons who have presided in this court. *Gray v. Gray*: Lord Nottingham, in a case whether a purchase made in the name of the son was a trust or an advancement, held it the latter, and that there should be no constructive trusts; he grounds himself upon this observation: "All the books agree that a feoffment to a stranger without consideration raised a use to the feoffor by implication."¹ "How can this court justify it to the world if it should make the law of trusts differ from the

¹ "But a feoffment to the son, without consideration, raised no use by implication to the father." 1 Eden, 249.

law of uses, in the same case?" They thought they were so strictly bound by it, they could not depart from it. They act under rules and checks, *i.e.* a discretion put upon them. As in *Attorney-General v. Scott*,¹ Lord Talbot of same opinion. In *Goodwin v. Winsmore*,² Lord Hardwicke of same opinion. This court has considered the trust, as between the trustees and *cestui que trust* and those claiming under them, as imitating the possession; and much more than a use was considered in this court; but not more than the court would have modelled uses, if uses had existed at this day. I do not see why the same determination should not be of a use, as imitating the possession, as there is now upon trusts. Would it not be a bold stride to say, this court has considered trusts as a mere nullity and notional; and that they are to be treated just the same as if they continued in the seisin of the creator of them or the person for whom they were made? Rules of property are not to be questioned even by the judges, while the people continue satisfied and acquiesce in them. None but the legislature can alter them. Trusts have imitated lands according to the strength of this jurisdiction always. My objection to the claim in the information is, not that it is to have a trust executed as if it were land, but it is to claim the execution of a trust that does not exist. If there was a trust, I should consider it merely as an estate, and determine accordingly. But the creation of a trust can never affect the right of a third person. The trustee has the burden and the legal privilege. Can this court say it is a nullity? and yet it must be so said, to take it from the trustee. *Servetur ad imum*. But it cannot be said 'tis a nullity in that respect as to a trust accepted. The conveyance shall subject the trustee to all the fruits of tenure. Though he has continued subject to all burdens when the trust subsisted, yet now it is said, as Mrs. Harding is dead, you shall be considered so no longer. As between trustee and *cestui que trust*, to say it is a nullity must be with this restriction, that he shall take no beneficial interest that the *cestui que trust* can enjoy. But any other he may. And therefore in respect to members, sheriffs, coroners, the trustee was the person who had the right to exercise it; and the legislature was forced to interpose, before the *cestui que trust* could have or enjoy that valuable privilege. 7 & 8 Wm. III. c. 25, § 7.

I can assign but one reason why that distinction between tenancy by curtesy and in dower has prevailed; and it is applicable to the reason of this case. I have heard the House of Lords was startled at the distinction, and they were told the opinion of conveyancers was so, and that, if it was altered, it might load purchasers with dower, who thought they had purchased free from it. And the Lords would not reverse the judgment, because they would not let it affect the right of a

¹ For. 138.² 2 Atk. 525.

third person. Now it appears to me that at law there can be no escheat, while there is a tenant *de jure*. In equity there could be none, while trusts were called uses, and a trust and a use are exactly the same. How, then, can I say the lord shall lose his escheat, when any man for his own convenience puts his estate in trust. It seems, if I were to do so, that I should give law and equity, and not pronounce upon law and equity.

Two centuries have passed since uses and trusts have been admitted, and¹ I cannot find a dictum that the crown shall have an escheat of a trust; but I find in other books the contrary, and by one of the most learned judges that ever adorned the profession. Hale, 247. Every writer of learning has transcribed and adopted this position, so that it is confirmed by them; viz., by attainder of felony of the feoffee, the lord shall have the land by escheat. Stanford P. C. 186; Pine's Case, 496;² Palmer, 176.³

In Sir George Sandys's Case,⁴ the court had no doubt upon that part of the case applicable to the present; viz., upon forfeiture of the fee-simple. The doubt was, whether the forfeiture should take place, on a term in gross or attendant upon the inheritance. 'Twas objected there, who should have the trust? The court said, Sir George Sandys should hold the land discharged of the trust of the term, as in the case of a grantee of a rent dying without heirs. And this is an answer to an objection for want of right and title in the defendant. The grantee there had purchased a perpetual rent and paid for it; the grantor had sold it; the grantee dies without heirs; there's nobody to call upon the person in possession for the rent. The reason why he should hold it is, here is nobody to call upon him; therefore no man can have a better right than he. How came it not to be considered in that case that it was a casualty that should come to the crown as *ultimus hæres*? Yet it never was; for confiscations are hard things, and contrary to the genius of a free country; and the law of England seems to have made a confiscation in no case, but where there is a vacant possession: and there 'tis for peace sake, and that quarrels may not ensue. But where a person is possessed of a thing, without getting it against law, he has a title. The judgment in Sir George Sandys's Case being an authority in point, great efforts are made to weaken the validity of it. Lord Hale's abilities have been questioned in equity. Then called a case of compassion; and that the family was concerned in it. That the contending party was the crown; that the Attorney-General could not drop the right, &c. But Lord Hale determined on great principles of

¹ This passage should be as follows: "Two centuries have passed since uses were extinguished, and since trusts have arisen; yet," &c. MS. Serj. Hill; 1 Eden, 252.

² Or Pim's Ca., Moore, 496.

³ Hix's Ca. Hardr. 176 and not Palmer.

⁴ W. Bl. 140.

law; and I can't help remarking, neither bar nor bench were ever frightened at the ill consequences which might follow which have been now mentioned. Perhaps they considered that it was the act of the party himself. They might carve out what estates they pleased, and reserve the limitation in fee. Does this court sit here to guard against the oscitancy or inattention of conveyancers in making use of trusts, and not preventing an escheat to the lord? Wherever the king is not lord his pardon would not signify; the escheat arises on the judgment. If the king pardons the felon, what hinders him from suing his trustee? Attainder don't prevent his assigning his trust. 'Tis determined in outlawry it does not. 'Tis said, the king on a legal escheat shall be liable to the equity of redemption, and 'tis said to be held so by Lord Hale.¹ But I don't know that has been determined. And I observe, though they agreed in opinion, they could not agree on the remedy, though they agreed in equity. I hope the Exchequer has (now) ascertained the remedy. I see an original equity impressed upon that case. The mortgage is made on condition. I would not have it understood that there's any equity for the subject, that the king is not equally entitled to; but I think the arms of equity are very short against the prerogative. 'Twas said, if a mortgagor die without heir, shall the mortgagee hold the land free? (I answer, Shall it escheat to the crown?) No, because in that case the lord has a tenant to do his services, and that is the whole he is entitled to in law and equity. What the justice might be between the mortgagee and executor I shall not trouble myself about. I think the crown has not an equity on which to sue a subpœna.

As to the claim of the heir *ex parte materna*, the estate is conveyed and the use executed in Page and Simons, and their heirs. A declared trust upon it to Mrs. Harding, her heirs and assigns, with a general declaration, which in my opinion operates no more than this, that, as between the *cestui que trust* and trustees they shall have the trust to no other use or purpose. Upon this I concur with the judges' certificate, that if no estate had passed to the trustee, or if that deed had never existed, the inheritance could not have descended to the heirs on the part of the mother.

Another question might have been put to the judges, *v. e.* If a use by this new conveyance had been limited, and not a trust, whether it would have descended to the heirs on the part of the mother? But the law was clear and plain; and a use, whether declared or resulting, must ensue the nature of the land, and retain the same quality; and whether it be expressed or resulting makes no manner of difference. Therefore they did not incumber the judges with that. It had been

¹ 1 W. Bl. 143, 149; and 2 Hawk. P. C. c. 27, § 54.

settled in Martin and Strachan,¹ Abbot,² and Freestone;³ 2 Roll. Abr. 780. Uses at common law, and trusts now, must ensue the nature of the land, as in the case of borough-English and gavelkind lands,⁴ they must ensue the nature of those inheritances. In the case of a resulting use, the true reason is, that 'tis never out of the grantor. In the case of trust 'tis the same—'tis the old trust; therefore I think the trust would not go to the heir of the part of the mother (in lands descended *ex parte paterna*); which, without a reconveyance, could never have a different descendible quality. In this case *prima facie* it was considered that nothing descended to the maternal heir, for the information says, "nothing descended to the heir of the mother's side."

But then it is said, if you will not make the deed of 1718 and fine a mere nullity, it alters the use, and that it vests a use and trust in Mrs. Harding as a purchaser. I wish I could find a ground to say the use is changed; but I cannot say it; because the way in which this bars the lord's right is not by changing the use, but by bringing a tenant on the land, which changes the lord's escheat; and though the old use is extinct, and no new use raised, yet that interposition will bar the lord of his escheat. But then it is said, if the old use is not altered, then the escheat takes place on its extinction, because 'tis engrafted upon it; when one fails, the other takes place. But that use may be determined and no new use raised, and yet the lord shall not have an escheat. Suppose Mrs. Harding had never executed this conveyance, and been disseised, and the disseisor had died seised, or made a feoffment, and Mrs. Harding had died without heirs *ex parte paterna*, the old use would have been determined, and yet the lord would not have been any nearer his escheat; for if⁵ the heir of the disseisor or the feoffee of the disseisor had been in, the old use had determined, and escheat would not take place.

It may be said, there is a new use obtained by the disseisor by operation of law, which will bar the escheat. If that can be said, I can with a better grace say, here is a new estate acquired by the trustee, by operation of law and his own conveyance. He has as much a use as a disseisor. There is no variance made in the use by Mrs. Harding. She has made a tenant to the estate. That tenant in my opinion is a bar to the lord's claim. I am therefore also of opinion, there is no alteration of this use. The consequence is, that the heir *ex parte materna* cannot be entitled to any part of the estate, except the mill and closes under the deed of 1713.

¹ 2 Stra. 1179; 5 T. R. 107, n. See 1 W. Bl. 129, n. (f).

² Abbot v. Burton, Salk. 590; 1 W. Bl. 126, n. (e).

³ Godbold v. Freestone, 3 Lev. 406.

⁴ Fawcett v. Lord Lonsdale, 2 Ves. Sen. 304.

⁵ For "if" read "in that case."

Original bill dismissed as to all the rest, and the information on the part of the crown dismissed totally.¹

MIDDLETON v. SPICER.

IN CHANCERY, BEFORE LORD THURLOW, C., MARCH 20, 1783.

[Reported in 1 *Brown, Chancery Cases*, 201.]

THIS case stood in the paper for further directions in Easter Term, 1780. Daniel Goodwin, seised in fee of copyhold lands, which he had contracted to sell, and also possessed of leasehold and other personal property, made his will, and thereby devised his copyholds and leaseholds to be sold, and the money arising from the sale he bequeathed to his executors in trust, after payment of debts and legacies, to pay the residue to the Society for the Propagation of the Gospel, and gave legacies to the executors. In 1767 the testator died without issue. In 1773 three of the executors of the testator filed a bill, insisting that the devise in favor of the Gospel Society was void, and claiming the residue as undisposed of.

On the 11th November, 1774, there was a decree, that the contract for the sale of the copyholds should be carried into execution, and the money to arise therefrom be considered as part of the personal estate, and that the devise of the leasehold estate to the charity was void; it was therefore decreed to be sold, and the next of kin (none of whom were before the court) were to go before the Master and prove their kindred. The leasehold was sold for £1,560. Upon an inquiry after next of kin,

¹ *Henchman v. Att'y-Gen.*, 3 M. & K. 485; *Taylor v. Haygarth*, 14 Sim. 8; *Davall v. New River Co.*, 3 De G. & Sm. 394; *Beale v. Symonds*, 16 Beav. 406 (conf. *Down v. Morris*, 3 Hare, 394); *Cox v. Parker*, 22 Beav. 168; *Sweeting v. Sweeting*, 33 L. J. Ch. 211, *accord*.

Matthews v. Wood, 10 Gill & J. 443 (see also *Smith v. McCann*, 24 How. 405); *Commonwealth v. Naile*, 88 Pa. 429 (statutory), *contra*.

Conf. Onslow v. Wallis, 1 MacN. & G. 506.

TRINITY COLLEGE IN CAMBRIDGE v. BROWNE.

IN CHANCERY, BEFORE LORD JEFFREYS, C., FEBRUARY 24, 1686.

[Reported in 1 *Vernon*, 441.]

THE bill was to discover the best beast of *cestui que trust* of a college lease; the defendant demurred, for that the best beast of the *cestui que trust* could not be taken for a heriot; and it also appeared of the plaintiff's own showing that the tenants, who had the estate in law in them, were yet living. The demurrer was allowed. — ED.

nobody claimed as such. And the question now was, whether upon this void devise the executors were beneficially entitled, or the crown, the Attorney-General being made a party to the bill, and claiming in that behalf.

Mr. Kenyon (for the executors). The question is, how this money is to go. The surviving executors claim, and unless Mr. Attorney can make out a better title on the part of the crown, they must prevail. It is not, of course, that whatever has no owner belongs to the king. There is no decision, in any similar case to the present, in favor of the crown. *Attorney-General v. Sandys*, *Burgess v. Wheate*, are both decided against the claim of the crown.

Mr. Attorney-General, contra. Why is the Attorney-General always made a party to bills in cases where there is no heir? On the part of the crown, I claim the undisposed part, amounting to about a thousand pounds. The executors here are entitled only as trustees; a legacy is left them for their trouble. They are not intended to take beneficially. There is not much doubt that the crown is entitled by prerogative. The king is owner of everything which has no other owner. It is so in the case of a legal intestacy, where there is no will. The grantee of the crown is entitled to administration to a bastard. Here, there is a will and an executor, to whom the Ecclesiastical Court has granted probate. The executor is owner only of a special property to collect for the next of kin. The case of the *Attorney-General v. Sandys* is very peculiar: it is of a forfeiture for felony, and one of the harshest and most odious forfeitures. In *Burgess v. Wheate*, an estate was vested in Sir Francis Page in trust for several persons; the last died without an heir. Burgess was heir *ex parte materna*, the estate coming *ex parte paterna*; Lord Mansfield held that the trust ought to follow the rules of a legal estate. The opinions of Lord Northington and Sir Thomas Clarke went upon two points: 1st, That the only case where the lord or the king was entitled was the defect of a tenant: where there was a feoffee there was a tenant, whether he was beneficially entitled or not; so that the principle of escheat failed. The argument was pressed by Lord Camden, then attorney, that, if the land escheated *propter defectum tenentis*, it would escheat when the line of the trustee failed; for the lord cannot lose his escheat, he therefore must have it on the failure of the line of the trustee, or of the *cestui que trust*; to construe this otherwise would be to give a trustee, created by the court of equity, one of the mischiefs of uses, depriving the lord of his escheat. This argument received no answer, though the court would not admit his conclusion from it. Admitting this argument would not bear as to the present case; the second ground in that case was a notion that the court of equity would not grant a subpoena against the feoffee for any who was not in privity with the feoffor; and,

therefore, that the crown not claiming in any privity could not have a subpoena. That argument begs the question that this court will consider the trustee as having something substantial, which cannot be taken from him but by the feoffor, or somebody claiming in privity with him; whereas the court considers the trustee only as an instrument. Against this argument stands the course of the court in making the Attorney-General a party wherever there is no heir or representative. The right to personal property is nominally in the executor, but it is only to collect the property, and attended with circumstances which show that it is for special purposes only. The position in *Salkeld*, 37, that the ordinary is not bound to grant administration to the grantee of the crown, but that it is done through respect, and that the property was, at law, in the ordinary, and the administration taken out only in certain cases, is founded upon a loose inquiry into the common law. The ordinary never had any interest in the property. He had jurisdiction in matters testamentary, but was always bound to account with somebody. 2 Inst. 398. He had such an interest as an administrator *durante minori ætate*, merely an authority, not at all resembling property. We are told the writ *de rationabili parte* was founded in the common law, to give the wife and children their shares, unaffected by the will. In Wilkin's Anglo-Saxon Laws, and the Laws of the Conqueror, the rights are clearly defined. Nath. Bacon, 89. By Glanv. L. 7, C. 6, 7, 8, only the validity of the will was contestable in the Court Christian. In the latter part of Hen. III. the right was perfectly fixed in the Ecclesiastical Court, as appears by the Magna Charta of John and Hen. III. History tells that about the latter end of John's reign the church obtained fuller authority than before over wills. In the M. C. of John, c. 27, the administration was to be *per visum ecclesiæ*; the church were only supervisors; this was omitted in Henry's charter. The cases are so inaccurate as to take the Statute of Westminster, as to payment of debts, as giving a right to the church; but the statute was only declaratory of the common law, which charged the residue with the debts, and the statute enforced the payment of them. The subsequent statutes only regulate the mode of distribution. No doubt the grantee of the crown would be entitled to a *mandamus*, to compel the grant of administration. In *Hobson v. Wells*,¹ it is determined the crown may grant administration.

Mr. Kenyon (in reply). *Mr. Attorney's* speech proves that the delay which has been in this case has enabled him to collect every argument the case affords. Still the reasoning does not affect the present case. This is not an intestacy: I could add a case from *Peere Williams* to show that in an intestacy the crown has a right; but, in this

¹ *Aleyn*, 53.

case, the crown has no legal right. The argument from the Statute of Uses does not apply to *Burgess v. Wheate*. The ground I go upon is, that the party for whom I am has a legal right. I thought I had a right to call upon them to show their equity, on the ground that *potior est conditio possidentis*. The executor has a right by occupancy, and the king has no stronger title. As to the Attorney-General being a party to bills, there are many cases in which unnecessary parties are made. From Stamford to Comyns there is not a saying that there is any such right as this in the crown.

LORD CHANCELLOR. I do not see how this case is distinguishable in principle from *Burgess v. Wheate*. The devise vests the legal property in the executor. If there is no executor, the crown may grant letters-patent to take out administration. The question results, whether the executor, being appointed only as a trustee, can claim as highly as an occupant at common law. Where there is a trustee, the general rule of the court is that he can have no other title. Mr. Kenyon contends, that the executor, being clothed with a legal title, has a right to hold the property. *Burgess v. Wheate* was determined upon divided opinions, and opinions which continue to be divided, of very learned men. The argument of the defect of a tenant seems to be a scanty one. Whether that case is such a one as binds only when it occurs *speciatim*, or affords a general principle, is a nice question. Thus much is decided, that in the case of a trustee who has merely an office, the court has been of opinion that the same claim which would have been competent if it had been at common law is not competent for such a trustee. Here the executor has a common-law right. The crown would have had a right had there been no executor. This case, I think, is obnoxious to every principle that can be drawn from *Burgess v. Wheate*. The legal estate in the trustee must remain in him, unless there is a claim against him which affects his conscience. If beyond the general title, there must be a privity with the testator; the crown has no such privity. If the trustee ought to hold it for every person who would have been entitled if it were at law, then he should hold it for the crown as well as any other person.

The cause stood over, and now came before the court for judgment. The reporter was absent, but has been favored with the following note.

LORD CHANCELLOR. It would be mere pedantry to run over all the cases to be met with on this subject, which are collected and fully stated in *Burgess v. Wheate*. This is not a case in which the assets can be marshalled, which is never done, unless to make a debt of an inferior nature payable. Lord Mansfield did not assent to the argument of the Master of the Rolls in *Burgess v. Wheate*, respecting an escheat; but no such question arises in the present case. Here the executors, having legacies bequeathed, and being clearly trustees, can-

not by any possibility take any beneficial interest.¹ In *Burgess v. Wheate*, and every other case that is to be met with, the Attorney-General has been a party, which shows that it was always the opinion that the crown had such an interest in cases of this kind that it was necessary to make him a party. The executors being excluded, and no relations to be found, I consider the executors as much trustees for the crown as they would have been for any of the next of kin, if these could have been discovered.²

Therefore decreed in favor of the crown, but directed all the executors' expenses to be paid.³

¹ See *Martin v. Rebow*, 1 Bro C. C. 154, notes and cases cited; 2 Story Eq. Jur. c. 33, § 1208 and notes.

² *Barclay v. Russell*, 3 Ves. Jr. 424; *Taylor v. Haygarth*, 14 Sim. 8; *Powell v. Merritt*, 1 Sm. & G. 381; *Cradock v. Owen*, 2 Sm. & G. 241; *Russell v. Clowes*, 2 Coll. 648 (*semble*); *Read v. Stedman*, 26 Beav. 495; *Darrah v. McNair*, 1 Ashm. 236 (*semble*), *accord*.

In *Taylor v. Haygarth*, 14 Sim. 8, Sir L. Shadwell, V. C., said, p. 18: "The distinction between the case of *Middleton v. Spicer* and the case before me is, that in the case of *Middleton v. Spicer* the subject of dispute was personal estate. It was a mere chattel real; and there is no doubt that, by the law of the land, the crown is entitled to the undisposed-of personal estate of any person who happens to die without next of kin." — ED.

³ The court (*inter alia*) ordered, "That in taxing the costs of the defendants, the executors, the Master should tax and settle the expenses they had been out of pocket on account of their trust and executorship; and they were to be at liberty to claim any allowance that had not been already made to them."

As to the residue, the declaration was, that "the same was a resulting trust in the executors for the benefit of the crown." And it was ordered to remain in the bank in the name of the accountant-general, &c., subject to the disposition of his Majesty and the further order of the court. — R. L.

CHAPTER IX.

THE INTEREST OF A TRUSTEE IN TRUST PROPERTY.

SECTION I.

A Trustee is the Absolute Owner of the Trust Property at Law.

GIBSON v. WINTER AND ANOTHER.

IN THE KING'S BENCH, MAY 22, 1833.

[Reported in 5 Barnewall & Adolphus, 96.]

COVENANT on a policy of assurance under seal, executed by the defendants, two of the directors of the Indemnity Mutual Marine Assurance Company, wherein, after reciting that the plaintiff had represented to the defendants that he was interested in, or duly authorized as owner, agent, or otherwise, to make the assurance, and had covenanted to pay the premium, it was witnessed, that in consideration of the premises, and of £80, the defendants covenanted with the plaintiff that the capital stock and funds of the company should be liable to pay and make good all such losses as might happen to the subject-matter of that policy in respect of the sum of £4,000, thereby assured, which assurance was thereby declared to be upon goods laden on board the ship called the "Courier," lost or not lost, at and from Rio de Janeiro to a market in Europe. The usual clauses of the policy describing the risks, &c., were then set out. The interest in the goods was averred to be in one Le Quesne, and a loss by the perils of the sea. Breach, non-payment of the sum of £4,000 by the defendants. Plea (among others), that the defendants within a reasonable time after the loss, and before the commencement of this suit, to wit, on, &c., at, &c., paid to the plaintiff, out of the capital stock and funds of the company the said sum of £4,000 in the said policy of assurance mentioned, according to the tenor and effect, true intent and meaning of the said policy; and upon this issue was joined. At the trial before Lord Tenterden, C. J., at the London sittings after Hilary Term, 1833, the following appeared to be the facts of the case: The policy was effected on goods the property of Mr. Le Quesne, of Jersey, who employed the plaintiff and his

partner, one Poindestrie, insurance brokers in London, for that purpose. A loss having occurred, a partial adjustment to the amount of £3,000 took place in 1829, between the plaintiff and defendants, the defendants then knowing that Le Quesne was the party interested in the goods insured. The defendants on that occasion gave credit to the plaintiff for £1,524 9s., due from him to them for premiums of insurance on ships and property of other persons, in part payment of this £3,000, and paid the balance, £1,475 11s., in cash to the plaintiff. On the 17th of July the plaintiff informed Le Quesne, by letter, that he had obtained a settlement of £3,000 on account, which sum would appear to the credit of his, Le Quesne's, account at two months from that date. Le Quesne in his answer said, "The same is placed in due conformity." In the first week of October, 1829, the plaintiff became bankrupt, without having paid over to Le Quesne either the amount received by him or that allowed in account by the defendants, and this action was in fact brought by Le Quesne in the name of the plaintiff to recover from the defendants £1,524 9s., on the ground that the plaintiff was authorized to receive the amount of the loss in money only, and that a payment in any other way was not binding on his principal. Lord Tenterden was of opinion that that general rule ought to prevail, unless Le Quesne had, in this case, recognized and adopted the mode of payment; and observed, that if the mode of payment had been made known to Le Quesne, and he had not, within a reasonable time, objected to it, he must be taken to have adopted it; that the question was, whether he did know it. Gibson, his Lordship observed, in his letter of the 17th of July, informed Le Quesne only that he had obtained an adjustment to the amount of £3,000, not that he had received actual payment of that sum, and that that sum would, at the end of two months, be placed to his, Le Quesne's, credit: Le Quesne, in his answer, after adverting to the adjustment, said, "The same is placed in due conformity." And he told the jury to find for the defendants if they thought Le Quesne meant to give credit for £3,000 to Gibson, and to accept him as his debtor instead of the defendants. The jury found for the defendants.

A rule *nisi* was obtained for a new trial, on the ground that Le Quesne's assent was not proved, and that although in general where an agent is employed to receive money of a debtor, and the debtor pays him money, the debtor is discharged; yet if the debtor does not pay in money, but settles the account by writing off so much money as may be due from the agent to him, the latter is not discharged. *Todd v. Reid*; ¹ *Russell v. Bangle*; ² *Bartlett v. Pentland*; ³ *Scott v. Irving*.⁴

The Solicitor-General, Sir J. Scarlett, and Tomlinson, in the last term

¹ 4 B. & A. 210.

² 4 B. & A. 395.

³ 10 B. & C. 760.

⁴ 1 B. & Ad. 605.

showed cause.¹ Though it be true that a broker has no authority to settle on any other terms than those of payment in money, yet if he receives payment in another mode, as by a set-off in a general account with the underwriter, and the assured afterwards recognizes and adopts that mode of payment, he cannot afterwards repudiate it. Here, the jury have found that there was such adoption, and there was ample evidence to warrant that finding. The plaintiff acted as Le Quesne's agent in effecting insurances for several years; he informed him on the 17th of July that he had obtained a settlement of £3,000 on account of the loss, and that that sum would appear to his Le Quesne's credit, at two months after date. Le Quesne, in his answer, assents to that, by stating "that the £3,000 shall be placed in due conformity;" in other words, that he will debit Gibson with that sum at the end of two months. [PARKE, J. That might be an assent, if Le Quesne had had notice of the mode in which payment had been made to Gibson; but he was not informed that any payment had been made, and much less that it was made by set-off in account.] Assuming that the finding of an assent cannot be supported, the cases cited in moving for the rule do not apply; for, in those, the actions were brought in the name of the assured, and not of the broker, and the assured disputed the authority of the broker to bind them; but here the action is brought in the name of the broker, and he attempts to repudiate his own act, and claims to be permitted to say that a payment which he himself has received is no payment at all. Any act done, or admission made by a party on the record, is evidence against him, even though he sue as trustee for another. *Bauerman v. Radenius*.² An admission by the obligee of an assigned bond (by whom the action must be brought) is evidence to bar the action. *Craib v. D'Aeth*.³ The issue raised on the record is, whether the sum mentioned in the plea was paid to the plaintiff; and the fact of payment to the plaintiff was made out.

R. V. Richards, contra. The issue is, whether payment was made according to the tenor and effect of the policy. It is consistent with the policy that Gibson may have effected it as agent, and that payment may have been made to him (as in fact it was) in that character. Then this payment to him by set-off in account was not one which he had authority to receive as agent, and therefore not a payment made according to the tenor and effect of the policy. Secondly, there was no evidence to warrant the finding of the jury that Le Quesne had ever assented to the payment by set-off in account between the defendants and Gibson, for there was no proof that Le Quesne was ever informed that the payment was made to Gibson in that mode. [PARKE, J. The difficulty is, that Gibson is the party to the record. Is there any

¹ Before Denman, C. J., Littledale, J., and Parke, J.

² 7 T. R. 665.

³ 7 T. R. 670, note (b).

authority for saying that a plaintiff, who has received payment in a mode satisfactory to himself, can be permitted afterwards to say that it is no payment?] In *Carr v. Hinchcliffe*,¹ to assumpsit for goods sold and delivered, the defendant pleaded that the goods were sold and delivered to the defendant by A., the factor and agent of the plaintiff, with the privity of the plaintiff, as and for the goods of A., and that the defendant did not know that the goods were not the property of A.; that at the time of the sale and delivery A. was and still is indebted to the defendant in more than the value of the goods, and that the defendant is ready and willing to set off and allow to the plaintiff the value of the goods, out of the moneys so due and owing from A.; and it was held, on special demurrer, that the plea was good. [PARKE, J. There, the principal was the plaintiff on the record; here, the agent is.] The covenant being with him, he is the only person who could sue on it, and the question is, whether, though a plaintiff sue in fact for the benefit of another, anything which would be matter of defence against him, the party on the record, is an answer to an action. *Cur. adv. vult.*

DENMAN, C. J., in the course of this term, delivered the judgment of the court, and, after stating the facts of the case, proceeded as follows:—

On the trial before the late Lord Tenterden, at the sittings after Trinity Term, the defendant had a verdict, on the ground that Le Quesne had acquiesced in and adopted the mode of payment to the plaintiff, and was bound by it. Mr. Pollock moved for a new trial in the following term: The case was afterwards fully argued before us; and if it had depended upon the propriety of the verdict we should have thought it right to submit the case to the consideration of another jury, for we are by no means satisfied that there was sufficient evidence of adoption by Le Quesne, as he was never correctly informed of the real state of facts.

Another objection was, that as the covenant was with Gibson, and he only could sue upon it, payment to him, in any mode by which he was bound, would be a good payment as against Le Quesne; and that as the settlement with the plaintiff bound him, it equally bound Le Quesne suing in his name. And upon full consideration, we are of opinion that this objection is valid.

The plaintiff, though he sues as a trustee of another, must, in a court of law, be treated in all respects as the party in the cause: if there is a defence against him, there is a defence against the *cestui que trust* who uses his name; and the plaintiff cannot be permitted to say for the benefit of another that his own act is void, which he cannot say for the benefit of himself.

The following are the authorities which appear to us fully to warrant

this position. In *Bauerman v. Radenius* (in which the question was whether the admission by the plaintiff, who was clearly a trustee for another, could be received in evidence), Lord Kenyon¹ says: "If the question that has been made in this case had arisen before Sir Matthew Hale, or Lords Holt or Hardwicke, I believe it would never have occurred to them, sitting in a court of law, that they could have gone out of the record, and considered third persons as parties to the cause. If the plaintiffs may be taken to be off the record, then they may be examined as witnesses; and yet it is not pretended they could have been examined. I cannot conceive on what ground it can be said that they may be considered not as the parties to the cause for the purpose of rejecting their admissions, and yet as the parties to the cause for the purpose of preventing their being examined as witnesses. I take it to be an incontrovertible rule, that an admission made by the plaintiff on the record is admissible evidence."² So a release by the plaintiff on the record suing for the benefit of another, was decided, in a case before Lord Mansfield (cited in *Bauerman v. Radenius*³), to be a good answer at law, and Lawrence, J., expresses the same opinion in the case last mentioned; and courts of law have been in the habit of exercising an equitable jurisdiction on motion, and setting such releases aside, or preventing the defendant from pleading them, as in *Legh v. Legh*,⁴ *Payne v. Rogers*,⁵ *Jones v. Herbert*,⁶ and *Abbott, C. J.*, in *Scaife v. Johnson*,⁷ and many other cases,⁸ which practice shows very clearly the opinion of the courts, that, but for their equitable interference, the real plaintiff would be barred. In *Craib v. D'Aeth*⁹ the circumstances of fraud upon the real plaintiff were replied; but no objection appears to have been taken on this ground, and the general practice is undoubtedly to apply specially to the court. Again, in *Alner v. George*,¹⁰ where trustees, for the benefit of creditors, sued in the name of the insolvent, Lord Ellenborough held that a receipt in full for the amount by the plaintiff was an answer to the action; and his Lordship said: "If a motion had been made in term time to prevent the defendant from availing himself of this defence, perhaps we might have interfered. Sitting here, I can only look to the strict legal rights of the parties upon the record; and there can be no doubt that a receipt, in full, where the person who gave it was under no misapprehension,

¹ 7 T. R. 668.

² As to the competency of an admission by a *cestui que trust* in an action by the trustee, see *May v. Taylor*, 6 M. & G. 261. — Ed.

³ 7 T. R. 666.

⁴ 1 Bos. & P. 447.

⁵ Doug. 407.

⁶ 7 Taunt. 421.

⁷ 3 B. & C. 422.

⁸ *e. g.* *Manning v. Cox*, 7 Moore, 617; *Barker v. Richardson*, 1 Y. & J. 362; *Roden v. Murphy*, 10 Ala. 804; *Woolfe v. Bate*, 9 B. Mon. 208; *Greene v. Beatty, Cox*, 142. — Ed.

⁹ 7 T. R. 670, note (b).

¹⁰ 1 Campb. 392.

and can complain of no fraud or imposition, is binding upon him. The plaintiff might have released the action; and it is impossible to admit evidence of his attempting to defraud others."

In *Jones v. Yates*,¹ Lord Tenterden says: "We are not aware of any instance in which a person has been allowed, as plaintiff in a court of law, to rescind his own act, on the ground that such act was a fraud on some other person, whether the party seeking to do this has sued in his own name only, or jointly with such other person;" and therefore it was held, that where one of two partners disposed of some of their effects in fraud of the other, both could not sue in a court of law to recover for them, in an action of trover.

Upon principle, and upon these authorities, we are of opinion, that if there be a good defence against the plaintiff, there is a good defence against Le Quesne suing in his name.

The only remaining question is, whether there is a good defence against the plaintiff.

Now, if the plaintiff was suing for himself, it is clear that the plea of payment would have been proved, for credit given to the plaintiff by mutual agreement for the amount of the premiums was equivalent to payment by the plaintiff to the defendants of that amount on account of the premiums, and a payment by the defendants to the plaintiff of the same sum on account of the loss.

We therefore think that the defendants were no longer liable, but as this point, upon which we decide the case, was intended to have been reserved, if necessary, by Lord Tenterden, in which case a nonsuit would have been directed, we think that a similar rule should be now pronounced.

*Nonsuit to be entered.*²

¹ 9 B. & C. 539.

² It is hardly necessary to cite the following authorities in support of the rule that actions at law (except actions founded on bare possession) must be brought in the name of the trustee, and not in the name of the *cestui que trust*. *Baker v. Washington*, 5 St. & P. 142; *Chambers v. Mouldin*, 4 Ala. 477; *Stoker v. Yerby*, 11 Ala. 222; *Parsons v. Boyd*, 20 Ala. 112; *Ryan v. Bibb*, 46 Ala. 323; *Treat v. Stanton*, 14 Conn. 445; *McRaeny v. Johnson*, 2 Fla. 520; *Wynn v. Lee*, 5 Ga. 217, 236; *Schley v. Lyon*, 6 Ga. 530; *Ponder v. McGruder*, 42 Ga. 242; *Daniel v. Daniel*, 6 B. Mon. 230; *Newman v. Montgomery*, 6 Miss. 742; *Pace v. Pierce*, 49 Mo. 393; *Philips v. Ward*, 51 Mo. 295; *Jones v. Strong*, 6 Ired. 367; *Walker v. Fawcett*, 7 Ired. 44; *Hower v. Geesaman*, 17 S. & R. 251; *Colenson v. Blewton*, 3 Hayw. 152; *Rogers v. White*, 1 Sneed, 68; *Binney v. Plumly*, 5 Vt. 500; *Poage v. Bell*, 8 Leigh, 604.

But the concurrence of the *cestui que trust* is necessary to sustain a petition for adjudication in bankruptcy. *Ex parte Culley*, 9 Ch. D. 307.

The defendant in an action by the trustee cannot plead by way of set-off a debt due to him from the *cestui que trust*. *Lane v. Chandler*, 7 East, 153 (cited); *Tucker v. Tucker*, 4 B. & Ad. 745, 751, 752 (*semble*); *Isberg v. Bowden*, 8 Ex. 852 (overruling *Bottomley v. Brooke and Rudge v. Birch*, cited in 1 T. R. 621, 622); *Porter v. Morris*, 2 Harring. 509; *Wheeler v. Raymond*, 5 Cow. 231 (but see s. c. 9 Cow.

295, and *Caines v. Brisban*, 13 Johns. 9) ; *President v. Ogle*, Wright (Ohio), 281 ; *Adams v. Bliss*, 16 Vt. 39.

But see *contra*, *Campbell v. Hamilton*, 4 Wash. C. C. 92, 94 (*semble*) ; *Winchester v. Hackley*, 2 Cranch, 342 ; *Chandler v. Drew*, 6 N. H. 469 (*semble*) ; *Wolf v. Beales*, 6 S. & R. 242. — ED.

IN THE MATTER OF THE APPLICATION OF JACOB BARKER, RELATIVE
TO THE ELECTION OF DIRECTORS OF THE MERCANTILE INSUR-
ANCE COMPANY OF NEW YORK.

IN THE SUPREME COURT, NEW YORK, JANUARY, 1831.

[Reported in 6 Wendell, 509.]

AN election of directors of the Mercantile Insurance Company of New York was holden on the 10th of January, 1831. Jacob Barker demanded to vote on 1,290 shares of stock standing in his name on the books of the company, 1,255 in his own right, and 35 as trustee for his minor children. His vote was challenged, and the challenge allowed by the inspectors. Had he been permitted to vote on the whole number of shares standing in his name, Samuel Hazard, and six other persons named in the proceedings, who the inspectors certified were duly elected, would not have been elected, but seven other persons, for whom Jacob Barker offered to vote, would have been elected in their stead; or had he been permitted to vote only on the 35 shares held by him as trustee, the effect would have been to have given a majority of votes to four individuals, who were voted for at the election as directors, and who were not returned as elected over Samuel Hazard and five other persons, who had an equal number of votes, and who were returned duly elected. The objection to Barker's voting on the 1,255 shares was, that they were hypothecated to the company to their full value. The company was incorporated in 1818. This case also presented the question whether an alien stockholder of this company has the right to vote by proxy, such vote having been offered and rejected by the inspectors.¹

The case was argued by

Jacob Barker, in *pro. per.* for the motion.

W. H. Bulkley, *contra.*

BY THE COURT, SAVAGE, C. J. In the case *Ex parte Holmes*,² we set aside an election of directors of an insurance company, because a trustee had been allowed to vote upon stock belonging to the company; not because a trustee had been permitted to vote instead of the *cestui que trust*, but for the reason that the stock in that case could not be voted upon, it being the property of the company, controlled by its officers; and we held, that neither within the meaning of the charter of the com-

¹ So much of the case as relates to this question is omitted. — Ed.

² 5 Cow. 426.

pany, nor of the act under which the proceedings were had, could it be tolerated, that the officers of a moneyed institution should wield such stock, however obtained, to control the result of an election of directors.¹ Such is the principle settled by that case, and what was said in relation to the rights of a trustee or *cestui que trust* to vote on stock, standing in the name of the trustee, either generally or specially, in his representative character, was said in reference to the peculiar circumstances of the case. The court never could have doubted the right of a person to vote upon stock standing in his name, although held by him in trust for another; the legal estate is in him, and until divested by assignment, either voluntary or compulsory, he is the only person entitled to vote.² Indeed, the case *Ex parte Holmes* admits that if the stock stands in the name of the trustee without expressing any trust, he has the right to vote. Jacob Barker, therefore, was entitled to vote upon the 35 shares holden by him as the trustee of his minor children.

He was also entitled to vote upon the 1,255 shares standing in his name in his own right, although they were hypothecated to their full value.³ So was the decision of the court in *Ex parte Willcocks*,⁴ where

¹ *American Co. v. Haven*, 101 Mass. 402, *accord.* — Ed.

² *North Shore Co.*, 63 Barb. 556, *accord.* "The trustee as the legal proprietor had originally the right of voting for coroners. *Burgess v. Wheate*, 1 Eden, 251; (a) but by 58 Geo. III. c. 95, § 2, it was transferred to the *cestui que trust* in possession. This act, however, has since been repealed, 7 & 8 Vict. c. 92, and the matter now stands as it did before any legislative interference. *Regina v. Day*, 3 Ell. & Bl. 859; see *post*, c. 25, § 1.

"So the trustee was the person entitled at common law to vote for members of Parliament. *Burgess v. Wheate*, 1 Eden, 251, per Lord Northington. But by the seventy-fourth section of 6 & 7 Vict. c. 28, as to the effect of certain intermediate statutes see (3d ed.) p. 270, it is enacted, that 'no trustee of any lands or tenements shall in any case have a right to vote in any such election for or by reason of any trust estate therein, but that the *cestui que trust* in actual possession or in the receipt of the rents and profits thereof, though he may receive the same through the hands of the trustee, shall and may vote for the same notwithstanding such trust;' and by the fifth section of 30 & 31 Vict. 102, the right of voting is conferred upon persons who are seised at law or in equity of lands or tenements of the yearly value of five pounds." *Lewin Trusts* (7th ed.), 214.

Trustees of shares in a company are subject to the same liabilities as if they held the shares for their own benefit. *Re Phoenix Co.*, 2 Johns. & H. 229; *Re Leeds Banking Co.*, 12 Jur. N. s. 60; *Lumsden v. Buchanan*, 4 Macq. 950; *Imperial Association*, L. R. 3 Eq. 361. — Ed.

³ *Merchants' Bank v. Cook*, 4 Pick. 405; *Hoppin v. Buffum*, 9 R. I. 513, *accord.* — Ed.

⁴ 7 Cow. 402.

(a) And Lord Northington added for "sheriffs" (*Burgess v. Wheate*, 1 Eden, 251), but the election of sheriffs had been transferred from the people to the chancellor, treasurer, and judges, by 9 E. II. st. 2, before the establishment of trusts.

we held, that until the pledge was enforced, and the title made absolute in the pledgee, and the name changed on the books, the pledgor should be permitted to vote. The restriction in the Revised Statutes, that hypothecated stock shall not be voted upon, applies only to corporations created, renewed, or extended subsequent to 1st January, 1828. The Mercantile Insurance Company was created long previous to that date.

A rule must therefore be entered declaring null and void the election of Samuel Hazard and the six other persons, who would have had a minority of votes had the vote of Jacob Barker been allowed; and that William Israel and the six other persons for whom Jacob Barker offered to vote, and who would have had a majority of the votes had the vote of Jacob Barker been received, are duly elected directors of the company.

JOHN H. B. LATROBE, TRUSTEE, v. THE MAYOR AND CITY
COUNCIL OF BALTIMORE.

IN THE COURT OF APPEALS, MARYLAND, OCTOBER 27, 1862.

[Reported in 19 Maryland Reports, 13.]

COCHRAN, J., delivered the opinion of this court.¹ This is an appeal from a judgment obtained in a suit at law, brought to recover taxes assessed on mortgages of property in the city of Baltimore, made to the appellant as trustee of the estate of Joseph Thornburg, deceased. At the time of the assessment and institution of the suit the appellant was a resident of Howard County, the *cestui que trusts* being, at the same time, residents of Baltimore City, and the question as to the liability of the appellant for the taxes assessed is the only one presented.

We are not aware that the acts of assembly, regulating the imposition and collection of taxes, have effected any modification of the rules of law, which otherwise must govern the determination of this question. The appellee, in resorting to its remedy at law, assumes that the taxes assessed constitute a legal cause of action, and that the appellant, as the holder of the legal title of the property upon which the assessment was made, is liable for its satisfaction. That taxes assessed upon a trust estate constitute a legal cause of action against the holder of the legal title we do not doubt, for at law the legal estate in the hands of a trustee has the legal incidents and obligations of an

¹ See *supra*, p. 79, n. 1. — ED.

absolute title, subject only to the claims in equity of the *cestui que trust*.¹ Crabb on Real Property, 55 Law Lib. 399; 97 Law Lib. 257; Willis on Trustees, 10 Law Lib. 21, 72, 83; Denton v. Denton.²

In this case, the appellant was the holder of the legal estate upon the valuation of which the taxes sought to be recovered were imposed, and upon our construction of the thirteenth article of the Bill of Rights, as well as upon the general rule stated, he was the proper person to be assessed for their payment. The declaration in that article of the duty or obligation of every person holding property in the State to contribute his proportion of public taxes, according to his actual worth in real or personal property, must be understood as intending and meaning a legal obligation to contribute to the public taxes, according to actual worth, and in that sense the obligation for the payment of taxes falls upon the trustee or holder of the naked legal title. Upon this construction the obligation of one entitled to the beneficial interest of property held by a trustee, to contribute to the public taxes, according to actual worth, is none the less satisfied; for in such a case the assessment of the tax to the holder of the legal estate, through him, reaches and fastens upon the interest of the beneficial owner. In our opinion, a like construction should be given to the provisions of the acts of 1841, c. 23, 1847, c. 246, and 1852, c. 327, requiring all property owned by persons residents of this State, and not permanently located elsewhere within the State, to be valued to the owner in the county, district, or city wherein he or she may reside, or, in other words, that these provisions contemplate and mean the holding or ownership of the legal estate of the property to be valued, without regard to the ownership of the equitable title or use. Adopting this view, we have then to ascertain the location of the property for which the taxes claimed were assessed, in order to dispose of the question presented. Upon the principle that the possession of personalty follows the person owning the legal title, the mortgages, on the valuation of which the assessment of the taxes in this case was made, so far as they could be made the basis of an assessment, were beyond the jurisdiction of the appellee. The assessment, in such cases, is made upon the amount of the mortgage debt, and not upon the value of the property mortgaged to secure it. As the basis of the assessment is the amount of the debtor's obligation to the creditor, the recording of a mortgage in another county or district than that of the creditor's residence, collaterally securing its

¹ Regina v. Strong, 12 A. & E. 84; Queen v. Stapleton, 4 B. & S. 629, *accord*.

Similarly, the trustee and not the *cestui que trust* is the proper party defendant upon other obligations incident to the legal title to the trust property; e. g., covenants running with the land: White v. Hunt, L. R. 6 Eq. 32; fines upon the admission to copyholds: Earl of Bath v. Abney, 1 Dick. 260; 1 Burr. 206, s. c. — Ed.

² 17 Md. 403.

satisfaction, cannot have the effect of locating the debt where the mortgage is recorded.

We think the taxes sought to be recovered in this case were assessed without authority, and therefore reverse the judgment.

Judgment reversed.

SECTION II.

What Interest in Trust Property may be transferred by a Trustee.

NOTE.

IN THE —, 1453.

[Reported in Fitzherbert's *Abridgment*, title *Subpœna*, placitum 19.]

IF I enfeoff a man to perform my last will and he enfeoffs another, I cannot have a subpœna against the second because he is a stranger, but I shall have a subpœna against my feoffee and recover in damages for the value of the land. Per *Yelverton* and *Wilby*, clerks of the rolls, who said that if my feoffee in confidence enfeoffed another upon confidence of the same land, that I should have a subpœna against the second, but otherwise when he was enfeoffed *bona fide*, for then I am without remedy, and so it was adjudged in the case of the Cardinal Winchester.

ANONYMOUS.

IN THE COMMON PLEAS, MICHAELMAS TERM, 1522.

[Reported in *Year Book*, 14 *Henry VIII.*, folio 4, placitum 5.]

ONE J. S. sued a replevin for his cattle tortiously taken.

The defendant avowed for that J. D. and J. B. were seised of a ploughland of land in their demesne as of fee to the use of R. N. by the feoffment F. R. &c., and being so seised granted an annual rent out of the said ploughland to A. by the name of Alice, wife of R., to hold during the term of her life, with a clause of distress, and afterwards Alice married the defendant, before the taking, and for so much in arrear he avowed the taking, &c.

To which the plaintiff said that J. D. and J. B. were seised to the use of W. N., and being so seised granted the said rent to the said A. as alleged, she then having notice of the use, that the said J. D. and J. B. enfeoffed one Halpenny in fee whereby he was seised, and being so seised, and Alice also being seised of the rent, the said W. N. by his deed released all his right to the said Halpenny to him and his heirs forever *absque hoc* that J. D. and J. B. were seised to the use of R. N. as the avowant has alleged, &c., and prays judgment if this avowry, &c.

FITZ HERBERT, J. First it is to be seen to whose use the grantee shall be seised.¹ I think he shall be seised to the first use, notwithstanding he had no notice, for uses are at common law and not by the statutes of Richard, and a use is but a trust and confidence which feoffor puts in his feoffee according to the estate which was at common law, for if a woman seised of land at common law will upon a communication of marriage enfeoff one, if he does not perform the trust the law gives her a remedy to recover her land back by a writ of entry *causa matrimonii prælocuti*. And so if I will that my executor sell my land which is devisable, if he will not, but takes the profits to his own use, the heir may enter upon him for the non-performance of his trust, as was adjudged in 38 Lib. Ass. p. 3. And then the trust is a necessity, for a dead man cannot perform his own will. But, sir, in this present case this feoffment in trust was only a pleasure and not a necessity, but still he is as much bound in conscience to perform his will as the executor, since he took the estate to do it, and if he deceives him no one will say that he does well. At the common law the feoffor had no remedy except by subpœna, but now by the statute he may enter and make a feoffment according to his will, if his feoffee will not do his will. But how a use shall be changed depends upon the common law and upon the estate of the feoffee, for if I enfeoff B. to hold to him his heirs and assigns my trust and confidence are in him, his heirs and assigns: and this is easily shown, for the heirs will be bound to perform the feoffor's will as much as the father, and the second feoffee as much as the first, if there is no consideration, and so it is if the feoffee suffer a recovery without a consideration. For it shall be intended since he parted with the land without consideration that he parted with it in the most proper way, *i.e.* to hold it as he held. For when an act rests in intendment and is indifferent, the law makes the most favorable presumption, for if I see a priest and a woman together suspiciously, still as long as there is doubt whether he is doing good or evil the former is to be presumed, and so here. And, sir, the rent is, in a manner, part of the land, and here the trust was in the land out of which the rent was granted, and this grant is without consideration, and it may be granted to the first use, wherefore it shall be so intended. And although the rent was not *in esse* and he had no use in it before, still he may have the use. For I take it clearly if one is seised of a seigniorie in gross and grants it to his use, if the land escheats, that the feoffee shall nevertheless be seised to the first use, for it comes in lieu of the seigniorie: and yet he had no use in the land before; and so one may grant for term of life and express the use.

BROKE, J., to the same intent. Sir, as the feoffor puts confidence

¹ Only so much of the opinion of the court as relates to this point is given. The replication was held insufficient. — ED.

and trust, so shall be his use, and the use is in the feoffor in conscience although the feoffee has the land by the common law. And so it is not like an estate upon condition at common law, for the whole inheritance is in the feoffee, and if he dies without heir, the feoffor cannot enter; but if he gives the land in tail and the donee dies without heir, he may enter, and every dealing with the land should be according to the wish of the feoffor. For if the feoffee acts otherwise, he is chargeable in conscience, and so is the heir of the feoffee; and the feoffee of the feoffee, if there is no consideration; and so is he who comes in by fine and false recovery. *Scilicet*, those recoveries in a writ of entry in the *post*. For in all these cases it is the act of the feoffee, and being without consideration the law intends that it was according to the first use; and, sir, conscience does not make the use, but common reason, which is common law, which is indifferent to all laws spiritual and temporal; and, sir, although common reason says that if I enfeoff one without consideration, this shall be to my use, still this land shall be in the feoffee like any other land and take the same course: for if he has a wife and dies, his wife shall have dower to her own use, for here there is no act of the feoffee and she does not claim by the feoffee, but the law makes her estate; and so if he is bound in a statute merchant; and so in case of a lord taking by escheat, for in these cases there was no act by the feoffee to deceive or defraud the feoffor, but it was done by order of the law. And, sir, the notice, as here, is the important matter, for if there was no notice there would be no use, but if he has notice, he is *particeps criminis*.

POLLARD, J., to the same intent. As has been said uses were at the common law and are nothing more than confidence and trust, and the feoffee is bound to act according to the trust, otherwise he would deceive his feoffor, which would not be reason. And there is a diversity when there is a default in the feoffee in deceiving the feoffor, and when not, for if the feoffee die his wife shall have dower, and so in case of a statute merchant or escheat, for there is no default in feoffee, but the operation of law. But the default is in me, and although my feoffee is bound in a statute merchant, still I can enter and make a feoffment and the execution is discharged. And so if my feoffee endowed his wife *ad ostium ecclesiæ* and I re-enter, it is void, for the feoffee took the estate by my feoffment, and not by law. And if the feoffees enfeoff one without consideration, it is the first use unless it be without notice; but if upon consideration without notice the use is changed, and if with notice, though upon consideration, the first use remains; and this is the diversity.

BRUDENELL, J., to the contrary.¹

¹ The opinion of Brudenell, J., is omitted. — ED.

NOTE.

PURCHASE FOR VALUE WITHOUT NOTICE.

THE principle that one who purchases a legal title from a trustee for value and without notice of the trust acquires the title discharged from the trust is fundamental. Y. B. 33 Hen. VI. f. 15, pl. 6; Y. B. 7 Hen. VII. f. 12, pl. 2; Bro. Ab. Feff. al Uses, pl. 50; Reynell v. Peacock, 2 Rolle, R. 105; Rooke v. Staples, Cary, 108; Clifford v. Langham, Tothill, 21; Cole v. Moore, Moore, 806; Harding v. Hardrett, Finch, 9; Salsbury v. Bagott, 2 Swanst. 608; Ferrars v. Cherry, 2 Vern. 384; Mertens v. Jolliffe, Amb. 311; Willoughby v. Willoughby, 1 T. R. 763; Plumb v. Fluitt, 2 Anst. 432; Jones v. Powles, 3 M. & K. 581; Thorndike v. Hunt, 3 De G. & J. 563; Pilcher v. Rawlins, L. R. 7 Ch. Ap. 259; Heath v. Crealock, L. R. 10 Ch. Ap. 22; Monckton v. Braddock, Ir. R. 7 Eq. 30 (*semble*); Bayley v. Greenleaf, 7 Wheat. 46; Vattier v. Hinde, 7 Pet. 252 (*semble*); Boone v. Chiles, 10 Pet. 177 (*semble*); Lea v. Polk Co., 21 How. 493; Dexter v. Harris, 2 Mason, 531; Fenno v. Sayre, 3 Ala. 458; Mundine v. Pitts, 14 Ala. 84; Ricks v. Reed, 19 Cal. 551; Moyer v. Waters, 51 Ga. 13; Fahn v. Bleekley, 55 Ga. 81; McCaskill v. Lathrop, 63 Ga. 96; Prevo v. Walters, 5 Ill. 35; Betser v. Rankin, 77 Ill. 289; Dickerson v. Evans, 84 Ill. 451; Irish v. Sharp, 89 Ill. 261; Goodtitle v. Cummins, 8 Blackf. 179; Brown v. Budd, 2 Ind. 442; Beckett v. Bledsoe, 4 Ind. 256; Crane v. Buchanan, 29 Ind. 570; Hampson v. Fall, 64 Ind. 382; Catherwood v. Watson, 65 Ind. 576; Derry v. Derry, 74 Ind. 560; Gray v. Coan, 40 Iowa, 327; Farmers' Bank v. Fletcher, 44 Iowa, 252; Lindsey v. Rankin, 4 Bibb, 482; Moore v. Dodd, 1 A. K. Marsh. 140; Owings v. Jouitt, 2 A. K. Marsh. 380; Halstead v. Bank of Ky., 4 J. J. Marsh. 554; Desha v. Jones, 6 La. An. 743; Hagthorp v. Hook, 1 Gill & J. 270; Molony v. Rourke, 100 Mass. 190; Hull v. Swarthout, 29 Mich. 249; Cogel v. Raph, 24 Minn. 194; Fulton v. Woodman, 54 Miss. 158; Digby v. Jones, 67 Mo. 104; De Groot v. Wright, 1 Stock. 55; Hogan v. Jaques, 19 N. J. Eq. 123; Demarest v. Wynkoop, 3 Johns. Ch. 129, 147; Whittick v. Kane, 1 Paige, 202; Newton v. McLean, 41 Barb. 285; Dillaye v. Comm. Bank, 51 N. Y. 345; Wilson v. Western Co., 77 N. C. 445; Ludlow v. Kidd, 3 Ohio, 541; Billington v. Welsh, 5 Binn. 129; Scott v. Gallagher, 14 S. & R. 333; Hughson v. Mandeville, 4 Dess. 87; Lewis v. Taylor, Riley, Ch. 179; Perkins v. Hays, Cooke, 163; Bass v. Wheless, 2 Tenn. Ch. 531; Chadwell v. Wheless, 6 Lea, 312; Flanagan v. Oberthier, 50 Tex. 379; Pepper v. Smith, 54 Tex. 115; Tompkins v. Powell, 6 Leigh, 576; Carter v. Allan, 21 Grat. 241.

PURCHASE WITH NOTICE FROM A PURCHASER FOR VALUE WITHOUT NOTICE. — A purchaser with notice from a purchaser for value without notice acquires the rights of the latter. Harrison v. Forth, Prec. Ch. 51; Salsbury v. Bagott, 2 Swanst. 608; Ferrars v. Cheney, 2 Vern. 383; Brandlyn v. Ord, 1 Atk. 571; Lowther v. Carlton, 2 Atk. 242; Mertins v. Jolliffe, Amb. 313; Sweet v. Southcote, 2 Bro. C. C. 66; McQueen v. Farquhar, 11 Ves. 467, 478; Kettlewell v. Watson (Ch. D.), 46 L. T. Rep. 83; Alexander v. Pendleton, 8 Cranch, 462; Myers v. Peek, 2 Ala. 648; Scott v. Orbison, 21 Ark. 202; Truluck v. Peoples, 3 Ga. 446; Chance v. McWhorter, 26 Ga. 315; McShirley v. Birt, 44 Ind. 382; Chambers v. Hubbard, 40 Iowa, 432; Moore v. Dodd, 1 A. K. Marsh. 140; Pierce v. Faunce, 47 Me. 507; Boynton v. Rees, 8 Pick. 329; Godfroy v. Disbrow, Walk. (Mich.) 260; Shotwell v. Harrison, 22 Mich. 410; Lusk v. McNamer, 24 Miss. 58; Price v. Martin, 46 Miss. 489; Harrington v.

Allen, 48 Miss. 492; Bell v. Twilight, 18 N. H. 159; Rutgers v. Kingsland, 3 Halst. Ch. 178, 658; Holmes v. Stout, 3 Green, Ch. 492; 2 Stock. 419, s. c.; Bumpus v. Platner, 1 Johns. Ch. 213; Jackson v. McChesney, 7 Cow. 360; Griffith v. Griffith, 9 Paige, 315; Webster v. Van Steenberg, 46 Barb. 211; Taylor v. Kelly, 3 Jones, Eq. 240; Card v. Patterson, 5 Ohio St. 319; Bracken v. Miller, 4 Watts & S. 102; Filby v. Miller, 25 Pa. 264; Church v. Ruland, 64 Pa. 432 (*semble*); City Council v. Paige, Speers, Eq. 159; Lacy v. Wilson, 4 Munf. 313; Curtis v. Lunn, 6 Munf. 42; Montgomery v. Rose, 1 Pat. & H. 5; Pringle v. Dunn, 37 Wis. 449. See to the same effect Chalmers v. Lanion, 1 Ames, Cases on Bills and Notes, 691, and n. 3.

But one who, in violation of his duty to the *cestui que trust*, has sold the trust property cannot, by reacquiring the property from a purchaser for value without notice, succeed to the latter's rights. Bovy v. Smith, 2 Ch. Ca. 124, 126; 1 Vern. 60, s. c.; Kennedy v. Daly, 1 Sch. & Lef. 379; *Re* Stapleford Co., 14 Ch. D. 432, 445 (*semble*); Bailey v. Binney, 61 Me. 361; Allison v. Hagan, 12 Nev. 38; Brophy Co. v. Brophy Co., 15 Nev. 101; Schutt v. Large, 6 Barb. 373; Church v. Ruland, 64 Pa. 432; Armstrong v. Campbell, 3 Yerg. 201; Troy Bank v. Wilcox, 24 Wis. 671; Ely v. Wilcox, 26 Wis. 91; 1 Ames, Cases on Bills and Notes, 691, 692, n. 3.

NOTICE BEFORE PAYMENT OF PURCHASE-MONEY. — A purchaser of the legal title is not protected from a prior equity if he receives notice of it at any time before payment of the purchase-money. Jones v. Stanley, 2 Eq. Ab. 685, pl. 9; Tourville v. Naish, 3 P. Wms. 307; Harrison v. Southcote, 1 Atk. 538; Story v. Windsor, 2 Atk. 630; Hardingham v. Nicholls, 3 Atk. 304; Maundrell v. Maundrell, 10 Ves. 246, 271; Taylor v. Baker, 5 Price, 306; Tildesley v. Lodge, 3 Sm. & G. 543; Molony v. Kernan, 2 Dr. & W. 31; Wormley v. Wormley, 8 Wheat. 449; Villa v. Rodriguez, 12 Wall. 323, 338; Wood v. Mann, 1 Sumn. 506; Dufphey v. Frenaye, 5 St. & Port. 215; Wells v. Morrow, 38 Ala. 125; Duncan v. Johnson, 13 Ark. 190; Brown v. Welch, 18 Ill. 343; Keys v. Test, 33 Ill. 316; Baldwin v. Sager, 70 Ill. 503; Roseman v. Miller, 84 Ill. 297; Slattery v. Rafferty, 93 Ill. 277; Gallion v. McCaslin, 1 Blackf. 91; Norton v. Williams, 9 Iowa, 528, 532; Kitteridge v. Chapman, 36 Iowa, 348; Simms v. Richardson, 2 Litt. 274; Nantz v. McPherson, 7 Mon. 597; Hardin v. Harrington, 11 Bush, 367; Thomas v. Graham, Walk. Ch. 117; Warner v. Whitaker, 6 Mich. 133; Blanchard v. Tyler, 12 Mich. 339; Palmer v. Williams, 24 Mich. 328; Minor v. Willoughby, 3 Minn. 225; Servis v. Beatty, 32 Miss. 52; Kilcrease v. Lum, 36 Miss. 569; Digby v. Jones, 67 Mo. 104; Patten v. Moore, 32 N. H. 382; Baldwin v. Johnson, Saxt. 441; Losey v. Simpson, 3 Stockt. 246; Campbell v. Campbell, 3 Stockt. 268; Haughwout v. Murphy, 21 N. J. Eq. 118; Dean v. Anderson, 34 N. J. Eq. 496; Frost v. Beekman, 1 Johns. Ch. 288; Murray v. Finster, 2 Johns. Ch. 155; Jewett v. Palmer, 7 Johns. Ch. 65; Farmers' Co. v. Maltby, 8 Paige, 361; Warner v. Winslow, 1 Sandf. Ch. 430; Christie v. Bishop, 1 Barb. Ch. 105; Harris v. Norton, 16 Barb. 264; Pickett v. Barron, 29 Barb. 505; Penfield v. Dunbar, 64 Barb. 239; Spicer v. Waters, 65 Barb. 227; Genet v. Davenport, 66 Barb. 412; Howlett v. Thompson, 1 Ired. Eq. 369; Youst v. Martin, 3 S. & R. 423; Union Co. v. Young, 1 Whart. 410; Beck v. Ulrich, 13 Pa. 639; Juvenal v. Jackson, 14 Pa. 519; Snelgrove v. Snelgrove, 4 Dess. 274, 287; McBee v. Loftis, 1 Strob. Eq. 90; Bush v. Bush, 3 Strob. Eq. 131; Pillow v. Shannon, 3 Yerg. 508; Beaty v. Whitaker, 23 Texas, 526; Fraim v. Frederick, 32 Texas, 294; Hutchins v. Chapman, 37 Texas, 612; Abell v. Howe, 43 Vt. 403; Doswell v. Buchanan, 3 Leigh, 365; Everts v. Agnes, 4 Wis. 343.

NOTICE BEFORE CONVEYANCE OF THE LEGAL TITLE. — A purchaser is not protected from a prior equity if he receives notice of it at any time before the conveyance is executed, even though he may have paid the purchase-money before notice. Wigg v. Wigg, 1 Atk. 384; Mackreth v. Symmons, 15 Ves. 335; Boone v. Chiles, 10 Pet. 177,

212 (*semble*); Moore v. Clay, 7 Ala. 742 (*semble*); Gallion v. McCaslin, 1 Blackf. 91; Simms v. Richardson, 2 Litt. 274; Nantz v. McPherson, 7 Mon. 597, 599; Currens v. Hart, Hardin, 37; Corn v. Sims, 3 Met. (Ky.) 391; Kilcrease v. Lum, 36 Miss. 569 (*semble*); Phillips v. Morrison, 24 N. J. Eq. 195; Dean v. Anderson, 34 N. J. Eq. 496 (*semble*); Frost v. Beekman, 1 Johns. Ch. 288, 301 (*semble*); Grimstone v. Carter, 3 Paige, 421, 436; Anketel v. Converse, 17 Ohio St. 11 (*semble*); Bush v. Bush, 3 Strob. Eq. 131 (*semble*); Pillow v. Shannon, 3 Yerg. 508 (*semble*); Blair v. Owles, 1 Munf. 38 (*semble*); Hoover v. Donally, 3 Hen. & M. 316; Mutual Society v. Stone, 3 Leigh, 218 (*semble*).

But see *contra*, Wheaton v. Dyer, 15 Conn. 307, 311 (*semble*); Paul v. Fulton, 25 Mo. 156, 163 (*semble*); Gibler v. Trimble, 14 Ohio, 323; Youst v. Martin, 3 S. & R. 423.

Similarly, if a bill negotiable only by indorsement is transferred by delivery merely to a purchaser for value without notice, but is not indorsed to him until after he has been notified of an equity attaching to the bill, the indorsee will acquire only the rights of his transferor. Esdaile v. Lanauze, 1 Y. & C. 394; Whistler v. Forster, 14 C. B. n. s. 248; Savage v. King, 17 Me. 301; Haskell v. Mitchell, 53 Me. 468; Allum v. Perry, 68 Me. 232; Lancaster Bank v. Taylor, 100 Mass. 18; Gibson v. Miller, 29 Mich. 355 (*semble*); Dowell v. Brown, 21 Miss. 43; Southard v. Porter, 43 N. H. 379; Clark v. Whitaker, 50 N. H. 474; Gilbert v. Sharp, 2 Lans. 412; Beard v. Dedolph, 29 Wis. 136 (*semble*).

See *contra*, Baggarly v. Gaither, 2 Jones, Eq. (N. C.) 80.

PARTIAL PAYMENT BEFORE NOTICE. — A purchaser of the legal title who has been notified of a trust or other equity to which it was subject, after a partial payment cannot be compelled to surrender the legal title except upon receiving reimbursement for what he has paid before notice. Servis v. Beatty, 32 Miss. 52 (*semble*); Paul v. Fulton, 25 Mo. 156, 163; Youst v. Martin, 3 S. & R. 423 (*semble*); Union Co. v. Young, 1 Whart. 410 (*semble*); Juvenal v. Jackson, 14 Pa. 519 (*semble*); Beck v. Uhrich, 13 Pa. 636, 16 Pa. 499; Everts v. Agnes, 4 Wis. 343 (*semble*).

But see *contra*, Doswell v. Buchanan, 3 Leigh, 365.

There is authority, indeed, for the position that a purchaser under such circumstances may retain the property purchased subject to a lien for the amount of the unpaid purchase-money in favor of the equitable incumbrancer. Flagg v. Mann, 2 Sumn. 566 (see also Wood v. Mann, 1 Sumn. 506); Haughwout v. Murphy, 21 N. J. Eq. 118. — Ed.

SAUNDERS v. DEHEW.

IN CHANCERY, BEFORE SIR JOHN TREVOR, SIR WILLIAM RAWLINSON,
AND SIR GEORGE HUTCHINS, COMMISSIONERS, JUNE 3, 1692.

[*Reported in 2 Vernon, 271.*¹]

ANNE BAYLY, being possessed of a term for years, makes a voluntary settlement thereof, in trust for herself for life, remainder to her daughter Isabella Barnes for life, remainder to the children of Isabella, by Mr. Barnes, her then husband. Isabella for £200 mortgages the lands in question to the plaintiff, who pretends he had no notice of the settlement; Isabella, in the mortgage-deed, being called the daughter and heir of John Bayley. The plaintiff hearing of it, gets an assignment of the term from the trustees.

Per Cur. Though a purchaser may buy in an incumbrance, or lay hold on any plank to protect himself, yet he shall not protect himself by the taking a conveyance from a trustee after he had notice of the trust, for by taking a conveyance with notice of the trust, he himself becomes the trustee, and must not, to get a plank to save himself, be guilty of a breach of trust. And the plaintiff's bill being brought against the children of Isabella to foreclose them, the court refused so to do, saying, if he might be suffered to protect himself, by thus getting in the legal estate, they would not carry it on by a decree in equity to foreclose.²

¹ Freem. C. C. 123, s. c. — Ed.

² *Allen v. Knight*, 5 Hare, 272; 11 Jur. 257, s. c., on appeal; *Carter v. Carter*, 3 K. & J. 617 (*semble*); *Prosser v. Rice*, 28 Beav. 68, 74 (*semble*); *Sharples v. Adams*, 32 Beav. 213, 216 (*semble*); *Baillie v. McKewan*, 35 Beav. 177; *Pilcher v. Rawlins*, L. R. 7 Ch. Ap. 259 (*semble*); *Mumford v. Stohwasser*, L. R. 18 Eq. 556, *accord*.

In *Carter v. Carter*, *supra*, Sir W. Page Wood, V. C., said, p. 639: "Sir John Leach laid it down (and I apprehend that he did not exceed the authorities referred to in that case when he so laid it down) that a purchaser from a person in possession purchasing without notice of any prior charge or trust, and obtaining a conveyance of the legal estate from the trustee of a satisfied term or the mortgagee of a satisfied mortgage, will always be protected in this court against a prior incumbrancer or *cestui que trust*, subject only to one observation which has considerable bearing on the case before me, — an observation to be found in Lord Eldon's remarks in *Maundrell v. Maundrell*, 10 Ves. 246, and repeated by him in *Ex parte Knott*, 11 Ves. 609, and several other cases, — which is this, that the party so conveying the legal estate must not have notice of an express prior trust or incumbrance. On looking through the authorities, you find that, where a conveyance is to be obtained from a mortgagee who has become a constructive trustee by the mortgage being satisfied, or from a trustee of a term to attend on the inheritance, the question who is or is not entitled to the equity of redemption or to the inheritance may be a question that may affect him as to the conveyance he may make; but, at the same

Note, In this case it was objected, that the plaintiff could not be an innocent purchaser without notice, because Isabella, who made the mortgage, had no title but under the settlement; and as to her being

time, there is no direct notice afforded by the document in the hands of the trustee or mortgagee of any ulterior trust beyond this, that he is to hold for the persons entitled. In *Maundrell v. Maundrell*, and again in *Ex parte Knott*, Lord Eldon discusses the whole doctrine, to which, he says, he has considerable aversion, and searches with great jealousy into the cases; and he says he has not been able to find a case where a person being a mortgagee without notice of a previous incumbrance has been held to be entitled to obtain from the trustee of an outstanding legal estate the conveyance of that estate, when the trustee himself had notice of the intervening incumbrance. And I must say, having now examined a great number of authorities, I have not been able to find a case of that description. I speak of cases where it is a dry trust, — not the case of a mortgagee whose mortgage is unsatisfied, but the dry trust of a satisfied mortgage or a satisfied term of years attending on the inheritance, where there is nothing but the trust remaining to be performed. There are several cases where the purchaser has been allowed at the last moment, after payment in full and up to decree, to get in an earlier mortgage; and there is no breach of duty in a person assigning his mortgage to anybody who pays him. Any purchaser is entitled to hold that which, without breach of duty, has been conveyed to him. But the case put by Lord Eldon is this: Could the purchaser insist on any benefit to be derived from that which would be a breach of duty or breach of trust in the trustee? In *Ex parte Knott* he says, 'Surely, if the purchaser would be safe,' — if the purchaser would be entitled to hold the estate discharged of the trust, — 'the trustee ought to be so.' The trustee should be protected in the act which he has committed. 11 Ves. 614. Whether that doctrine will ultimately be held, it is not perhaps important for me, at present, to say; but I must say, on looking through a vast number of volumes of the earlier and later authorities, I have not found any such case as Lord Eldon has put, — I have not found any case in which a purchaser, obtaining a conveyance of a mere dry trust estate from a trustee of a satisfied term, or from a mortgagee whose mortgage has been satisfied, such trustee or mortgagee having at the time when he made the conveyance notice of an intervening charge or trust, has been held entitled to protect himself from such charge or trust by means of the legal estate which he has so obtained."

In *Pilcher v. Rawlins*, *supra*, Sir W. M. James, L. J., said, p. 268: "I do not mean, in the few observations which I am about to make, to refer to a class of cases which appear to me entirely distinct in principle from the case now before us. I mean that class of cases in which a person finding himself in possession under a defective title has cast about to cure that defect by procuring some one else to convey an outstanding legal estate. No doubt it has been held in this court that a man under those circumstances may get in a mortgage and tack his defective title to the estate of that mortgagee. He has also been allowed to get in an outstanding legal estate from a person who, being a trustee for the real owner, is not a trustee for the person seeking the conveyance. But those cases where the person seeking the conveyance knew the fact that the trustee was trustee for somebody else, and could not convey without a breach of trust, whilst the trustee was left in ignorance, — those cases, I say, involve a principle which I have never been able to understand."

In *Mumford v. Stohwasser*, *supra*, Sir G. Jessel, M. R., said, p. 562: "There is a second point raised on which I have a word to say, although I think it does not arise in this case. I mean the question, what the effect would be if the defendant had no notice of the trust. I say I do not think it is necessary to decide it, because I hold that he had notice. As to this second point, there has been a great conflict of opinion; my own

called daughter and heir of John Bayly, it was known that the estate was only a chattel; if it had been pretended to be an inheritance, some deed or settlement must have been produced to make it so.

Note, In this case, the plaintiff had also bought in a mortgage made by Anne Bayley herself, which, though subsequent to the settlement, that being voluntary, was a good mortgage.

opinion is, that even without notice he could not have acquired title; but, as I said before, there is probably no point on which there has been greater difference of opinion. I entirely subscribe to what Lord Justice James said, in the case of *Pilcher v. Rawlins*, Law Rep. 7 Ch. 259, as to the old cases, in which a trustee of a term to attend the inheritance was allowed to assign in such a manner as to give preference, being contrary to all principle. Those were really cases of constructive notice, because the person taking the assignment must have known that the person assigning was a trustee for some one. What Lord Justice James says is this, Law Rep. 7 Ch. 268: 'Those cases where the person seeking the conveyance knew the fact that the trustee was trustee for somebody else, and could not convey without a breach of trust, whilst the trustee was left in ignorance, — those cases, I say, involve a principle which I have never been able to understand.' The case on which I have just expressed my opinion is the converse one to that put by the Lord Justice. I do not mean the actual case now before me, because I hold that the mortgagee had notice; but supposing that I did not so hold, this would be the case of a trustee knowing that he was a trustee assigning over the legal estate to a person who did not know he was a trustee, that person having previously acquired an equitable interest; and I should hold, if that neat point came for decision, which I think it does not in this case, that the second equitable incumbrancer or the purchaser of the equity did not thereby gain any priority; in other words, that a person knowing that he is a trustee, cannot, without receiving value at the time, by committing a breach of trust, deprive his own *cestui que trust* of his rights. Here, however, the point I have to decide is whether a person with notice at the time he takes the legal estate that the person assigning it is a trustee of the estate can get priority. I think that has been long since settled."

See to the same effect, *Marfield v. Burton*, L. R. 17 Eq. 15, 19; *Harpham v. Shacklock*, 19 Ch. D. 207. — Ed.

BATES v. JOHNSON.

IN CHANCERY, BEFORE SIR W. PAGE WOOD, V. C., APRIL 20, 27;
MAY 30, 1859.

[*Reported in Johnson*, 304.]

VICE-CHANCELLOR SIR W. PAGE WOOD.¹ The facts upon which the question in this case arises may be very shortly stated. In 1823, previously to his marriage, Thomas Ellis Bates, the father of the plaintiffs, made a settlement, by which he agreed to convey certain real property, of which he was seised in fee-simple, to trustees, upon trust for his then intended wife, during her life, for her separate use, with remainder for the survivor of them for life, with remainder for their children. He afterwards suppressed that settlement, and in fraud of it made three successive mortgages of the property, — the first to one Brooke, since deceased, the second to the defendant Nash, and the third to the defendant Hooke, all of which are now vested in Hooke. And the short question is, whether, each mortgagee having advanced his money without notice of the settlement, the third, who has got in the legal estate since the institution of the suit, can insist upon that legal estate against the plaintiffs, who had filed their bill to redeem the first mortgage.

The plaintiffs admit, that, as against the first mortgagee, they are unable to establish any priority, he having advanced his money and taken his security without notice of their equity; but they insist, that, upon redeeming him, they will be entitled to the estate discharged of the subsequent mortgages, notwithstanding the legal estate has been got in by the third mortgagee in the manner I have described.

The plaintiffs, of course, admit the long-established doctrine, that, where there are three successive mortgagees, the third taking his security without notice of the second at the time of advancing his money, if the third can obtain, even after bill filed, a conveyance of the legal estate from the first, he can, as it is termed, “squeeze out” the second, although at the time of obtaining such conveyance he had full notice of the existence of the second mortgage. The fact of his having such notice at the time of his getting in the legal estate is immaterial, provided he had no such notice at the time when he advanced his money. Whether the principle is satisfactory or not is not the point, but it is now settled beyond dispute upon the authorities; and the result is (although I am not aware that such a case has actually occurred), that, if a second and a third mortgagee are both equally desirous of redeeming

¹ See *supra*, p. 79, n. 2. — ED.

the first, the first mortgagee has it in his power, if he be so minded, to give the preference to which of the two he pleases, — a result contrary to the ordinary doctrine of the court. In every case, down to *Peacock v. Burt*,¹ which is probably one of the most striking of the kind, it has been held, that, when once a subsequent incumbrancer, who, by advancing his money without notice of prior mesne incumbrances, stands in an equally good position with them in every respect, except as regards time, gets in the legal estate, he has a right to avail himself of that legal estate until the whole of his incumbrance is discharged.

Peacock v. Burt was a very strong case, for this reason: There the first mortgagee had notice of the second mortgage as soon as it was made; and, with that notice before him, he made further advances to the mortgagor, and subsequently joined with the mortgagor in executing a transfer, and further charge on the estate, in favor of a third mortgagee, without informing him of the intervening incumbrance, of which notice had been given him for the very purpose of protecting it from being so defeated: yet it was held, that the third mortgagee, who had thus obtained the legal estate, was entitled to hold it discharged from the intervening incumbrance.

But the plaintiffs rely on the covenant on the part of the settlor, that, until the hereditaments and premises shall have been conveyed and assured pursuant to his covenant, all and every the hereditaments and premises, and the rents and profits thereof, shall be held, paid, applied, and disposed of upon the trusts mentioned in the indenture of settlement. This, they say, was a covenant running with the land, and would bind the first mortgagee when once he had notice. It was suggested, that possibly it might bind him even without notice, as a covenant running with the land, so as to give a right of action at law; but, at all events, it was argued, that it would bind him after he had received notice of the settlement, and would be equivalent, in fact, to a declaration of trust, and ought to have the same effect as a declaration of trust inserted in his mortgage, and binding him, after satisfying his own debt, to hold the property upon the trusts of the settlement; and his conscience being distinctly and clearly affected by the trusts of the settlement, it was a breach of trust, as the plaintiffs insisted, in him to convey the property to a subsequent mortgagee, instead of conveying it upon the trusts by which he himself was affected.

After carefully reconsidering the authorities which I had occasion to refer to in *Carter v. Carter*,² I do not see that there can be any doubt whatever as to the doctrine established by the authorities. The authorities, as it seems to me, have gone to this extent (although I am still of opinion that they have never gone further), that any person having an

¹ Reported in *Coote on Mortgages*, pp. 569, 572; s. c. 4 L. J. N. s. Ch. 33.

² 3 K. & J. 617.

unsatisfied mortgage or charge upon real property is at liberty, at any time before decree, to convey the legal estate in the property, in respect of his unsatisfied charge, to any subsequent incumbrancer, who may have advanced his money without notice of any intervening or other charge or incumbrance, and by so doing may give to that other incumbrancer a right, which this court cannot take from him, to insist upon the legal estate, which, as the court holds, he has thus properly acquired.¹

In the case of a satisfied mortgage, where the mortgagee would hold simply upon trust for the original mortgagor or those claiming under him, or in the case of a trustee of a satisfied term, — which are the cases put by Lord Eldon in *Maundrell v. Maundrell*² and *Ex parte Knott*,³ — I do not find any authority which decides, that, where notice has once been fixed upon the person thus holding as a trustee of a dry legal estate for the benefit of the parties entitled, he is at liberty to convey that estate to a third party, or to give to such third party a security which could only be acquired through the medium of a breach of trust on his part. It is true, that I do not find any authority which expressly determines the contrary: *Saunders v. Dehew*,⁴ and *Allen v. Knight*,⁵ which came first before V.-C. Wigram, and afterwards before Lord Cottenham, have determined, that, where there is an express declaration of trust, the trustee cannot convey the property otherwise than in the condition in which he holds it, namely, fettered with the trusts declared by the deed. But those were cases of express trust, and therefore distinguishable. Upon looking through all the authorities, I adhere to the observations which I made in *Carter v. Carter*.⁶ I have not been able to find any case such as Lord Eldon has put, and in which it has been held that a purchaser obtaining a conveyance of a mere dry trust estate, whether from a trustee of a satisfied term or from a mortgagee whose mortgage has been satisfied, such trustee or mortgagee having, at the time of making the conveyance, notice of an intervening charge or trust, the purchaser is entitled to protect himself from such charge or trust by means of the legal estate which he has so obtained. And it appears to me that the observation of Lord Eldon is very strong, that if the purchaser can so protect himself, then the trustee ought to be indemnified in respect of his having made the conveyance.⁷ In other words, you can hardly say that the estate is acquired by a conveyance which is a breach of trust on the part of the person making it, and known to be so by him at the time that he is making the conveyance.

¹ See 3 K. & J. 640.

² 10 Ves. 246.

³ 11 Ves. 614.

⁴ 2 Vern. 271.

⁵ 5 Hare, 272; s. c. on appeal, 16 L. J. N. S. Ch. 370.

⁶ 3 K. & J. 640.

⁷ See per Lord Eldon in *Ex parte Knott*, 11 Ves. 614.

In applying the law to the facts of the case before me, all I find is this: I find a first mortgagee, who advances his money, and takes his security, without any notice whatever of the trust. Whether he is affected by the covenant running with the land is a question, which, if it be necessary to determine it at all, must be determined by a court of law. He takes his security without any notice whatever, either upon the face of his mortgage deed or otherwise, of any trust. There is no engagement upon his part to perform any trust. It is not like the case put in argument, on behalf of the plaintiffs, of a declaration of trust of a satisfied term, where the party obtaining such a declaration of trust is held to be in the same position as if he had obtained an actual assignment of it, the declaration of trust being equivalent to an actual assignment, and, therefore, preventing the trustee from afterwards parting with the legal estate for the benefit of himself, and to the detriment of those for whom he has declared himself to be a trustee. Here the first mortgagee takes the legal estate without making any declaration of trust—he never hears of the existence of any trust affecting the mortgaged property until after his money has been advanced; and in that state of circumstances a first mortgagee is, I apprehend, in the same position as any other unsatisfied mortgagee having notice of a subsequent incumbrance, and has a right to transfer the legal estate so vested in him to any person who will pay off his debt. He is not to be fettered or incumbered by any considerations arising out of a trust which he has never undertaken, and of which he is never informed until after he has parted with his money. Having the legal estate in his hands, he is justified in transferring it as he took it from the original mortgagor, and subject only to the equity of redemption limited by his mortgage deed, and may transfer it to the second or to the third incumbrancer, as he may see fit.

That being the position of the first mortgagee, what is the position of the subsequent mortgagee, who, having, like the first, advanced his money without notice of any prior trust, obtains from the first that legal estate which the first may thus lawfully convey? The two positions seem to me correlative. If the holder of the legal estate can thus lawfully convey it, the party to whom he so conveys it can lawfully avail himself of it for the purpose of repaying to himself every advance which he may have made upon the security of the property, without notice of the rights of any other person in priority to his own. To that he is entitled, according to the authorities, at any period after bill filed, as well as before, until a decree is made in the suit. And I cannot in substance distinguish the case before me from the class of cases ending with that of *Peacock v. Burt*.

The question as to the policy of assurance appears to me to be involved in the former. If I had held that the plaintiffs, upon discharging the

first mortgage, would be entitled to redeem, and to hold the estate free from the subsequent charges, the consequent right would have followed, and they would have been entitled to hold all the other property included in the mortgage to the first mortgagee for the purpose of recouping to themselves whatever they might so have paid in discharging the first mortgage. In other words, upon payment of the mortgage debt they would have been entitled to all the securities. The second question, therefore, in substance, resolves itself into the first.

As regards the first, it appears to me, upon a review of the whole class of authorities, that there is nothing to justify me in holding that the first mortgagee could not lawfully part with his legal estate so long as his debt remained unpaid. And he having parted with it, I find nothing in the authorities to authorize me in saying that I am to take the legal estate away from the holder of it until the whole of his debt has been satisfied.¹

¹ The doctrine of "tacking" as established in the case of *Marsh v. Lee*, 1 Ch. Ca. 162; *Hard*, 173; 2 Vent. 337, s. c., although frequently recognized by the English courts, — *Bovey v. Skipwith*, 1 Ch. Ca. 201; *Anon.*, 2 Ch. Ca. 35; *Anon.*, 2 Ch. Ca. 208; *Windham v. Atkins*, 2 Ch. Ca. 212; *Cockes v. Sherman*, *Freem. C. C.* 13; *Hawkins v. Taylor*, 2 Vern. 29; *Brace v. Marlborough*, 2 P. Wms. 491 (*semble*); *Morret v. Paske*, 2 Atk. 52 (*semble*); *Matthews v. Cartwright*, 2 Atk. 347; *Wortley v. Birkhead*, 2 Ves. 571; 3 Atk. 809, s. c.; *Titley v. Davies*, 2 Y. & C. C. C. 403; *Belchier v. Butler*, 1 Eden, 523; 5 Bro. P. C. (Toml. ed.) 292; *Robinson v. Davison*, 1 Bro. C. C. 63; *Peacock v. Burt*, 4 L. J. N. s. Ch. 33; *Rooper v. Harrison*, 2 K. & J. 86 (*semble*); *Spencer v. Pearson*, 24 Beav. 266, — is to be regarded as anomalous. Lord Blackburn said, in *Jennings v. Jordan*, 45 L. T. Rep. 597: "Some of the rules acted on in courts of equity in the kindred subject of tacking securities on the same property are founded upon this, that a mortgage, after the time specified for redemption had expired, was an absolute estate, which no doubt it was at law; and that the equity of redemption was only a personal equity to take away the legal estate from him in whom it was vested, which perhaps it originally was. It would seem that now, after equitable estates have been treated and dealt with for a very long time as to all other intents estates, any rules founded on the antiquated law ought to be no longer applicable, and that *cessante ratione, cessare debet et lex*; but some rules apparently founded on this antiquated law have been so uniformly and long acted upon that they must be treated as still binding. The rule was first laid down in *Marsh v. Lee*, 2 Vent. 337, that if there was a subsequent mortgagee, who, as the legal estate was in another, could only be a mortgagee of the equity of redemption, whose claim being prior in time to that of a third mortgagee would be satisfied before it, yet if the third mortgagee acquired the legal estate, even with full knowledge of the existence of the second mortgage, he should be entitled to squeeze out the second mortgage. In *Brace v. Duchess of Marlborough*, 2 P. Wms. 491, in 1728, the Master of the Rolls thought that the rule of equity was so settled, 'not, however, without great appearance of hardship; for still it seems reasonable that each mortgagee should be paid according to his priority, and hard to leave a second mortgagee without remedy, who might know when he lent his money that the land was of sufficient value to pay the first mortgage and his own also; to be defeated of a just debt by a matter *inter alios acta*, a contrivance between the first mortgagee and the third, is great severity.' Yet notwithstanding these, as it seems to me, unanswerable

objections to the rule, he considered it established. In *Wortley v. Birkhead*, 2 Ves. Sen. 571, Lord Hardwicke intimates, I think pretty plainly, that if it were then to be settled for the first time he would have decided the other way, but that it was settled; and in *Titley v. Davies*, 2 Y. & C. C. C. 403, in 1743, he acted upon it; and now, after the lapse of nearly a century and a half more, I think only the legislature can do away with this rule." See also 2 Fisher, Mortgages (3d ed.), 600.

The English doctrine of "tacking" has met with no favor in this country. 1 Story, Eq. Jur. (12th ed.), §§ 413-419; 4 Kent (12th ed.), 177-179; *Osborn v. Carr*, 12 Conn. 195, 208; *Gallion v. McCaslin*, 1 Blackf. 95, n. 3; *Wing v. McDowell*, Walk. Ch. 175; *Grant v. United States Bank*, 1 Cal. Cas. 112; *Bridgen v. Carhartt*, Hopkins, 234; *Brazee v. Lancaster Bank*, 14 Ohio, 318, 321; *Henderson v. Neff*, 11 S. & R. 208, 222; *Chandler v. Dyer*, 37 Vt. 345; *Siter v. McClanachan*, 2 Grat. 280, 300, 301. But the general prevalence of the system of registration here deprives the doctrine of all practical importance. See also *La Touche v. Dunsany*, 1 Sch. & Lef. 137, 157.

The "tacking" above mentioned is to be carefully distinguished from the case where a mortgagee having the legal title makes subsequent advances in ignorance of an intervening mortgage, and where, of course, the first mortgagee is entitled to repayment of the subsequent advances in priority to the intervening mortgagee. *Collet v. De Gols, Talbot*, 65; *Hopkinson v. Rolt*, 9 H. L. C. 514 (*semble*); *Young v. Young*, L. R. 3 Eq. 801; *Shirras v. Caig*, 7 Cranch, 34; *Re Haake*, 7 N. B. R. 61; 2 Sawy. C. C. 23, s. c.; *Boswell v. Goodwin*, 31 Conn. 74; *Frye v. Illinois Bank*, 11 Ill. 367 (*semble*); *Brinkmeyer v. Browneller*, 55 Ind. 487 (*semble*); *Nelson v. Boyce*, 7 J. J. Marsh. 401; *Wilson v. Russell*, 13 Md. 494 (*semble*); *Ladue v. Detroit Co.*, 13 Mich. 380 (*semble*); *Ward v. Cooke*, 17 N. J. Eq. 93; *Truscott v. King*, 6 Barb. 346; 2 Seld. 166, s. c.; *Spader v. Lawler*, 17 Ohio, 371 (*semble*); *Bank of Montgomery Co.'s Appeal*, 36 Pa. 170; *McDaniels v. Colvin*, 16 Vt. 300. — ED.

DODDS v. HILLS.

IN CHANCERY, BEFORE SIR W. PAGE WOOD, V. C., MARCH 22, 1865.

[*Reported in 2 Henning & Miller, 424.*]

THE plaintiff was a married woman (suing by next friend), upon whom certain shares in the Whittle Dean Water Company had been settled for her separate use. The shares stood in the name of Henry Hills, as sole trustee, having formerly stood (as the share certificate showed) in his name jointly with that of another person.

On the 19th of September, 1857, Hills obtained an advance from the defendant, Smith, out of the funds of a club of which Smith was secretary; as security for which he executed a transfer of the said trust shares, and handed the same, together with the certificate of the shares, to Smith. He also gave a promissory note to the treasurer of the club.

Further advances were made by Smith, partly out of the funds of the same and another club of which also Smith was secretary, and partly out of his own moneys; and it was verbally arranged between Hills and Smith that the shares should be held by Smith as security for these further sums. The security of the shares appeared to have been given to Smith personally to indemnify him, and not directly as a security to the clubs. At the time when these advances were made, Smith had no notice of the trust, or that the shares were not the absolute property of Hills. Hills regularly received the dividends, and paid them over to the plaintiff.

On the 7th of June, 1863, Hills absconded; and on the 30th of June a petition in bankruptcy was filed, under which he was declared bankrupt.

On the 14th of June, 1863, the plaintiff and her husband informed Smith that Hills held the shares upon trust for the plaintiff.

On the 19th of June, 1863, Smith sent the transfer, with the certificate, to the secretary of the company for registration, and the shares were on the following day registered in the name of Smith.

The Whittle Dean Water Company was constituted by act of Parliament, with which the Companies Clauses Consolidation Act was incorporated.

The bill prayed that the transfer of the shares might be set aside; or, in the alternative, that the plaintiff might be let in to redeem.

Mr. Willcock, Q. C., and *Mr. Torriano*, for the plaintiff. The transfer not having been executed by the transferee, so far as appears, nor sent for registration until after notice of the trust, cannot be set up

against the plaintiff's title. Until the 19th of June, the defendant had only an equitable title subsequent to the equitable title of the plaintiff. By the provisions of the Companies Clauses Consolidation Act, § 15, Hills, whose name remained on the register, was consequently the owner of the shares until after the defendant received notice of the trust; and it was not competent for the defendant, after notice, to get the legal estate into himself. *Hay v. Willoughby*; ¹ *Sayles v. Blane*; ² *Cory v. Eyre*; ³ *Stackhouse v. Jersey*; ⁴ *Carter v. Carter*; ⁵ *Manningford v. Toleman*.⁶

Mr. Rendall, in the same interest. You can't get in the legal estate from a person who cannot give it without a breach of trust. Now the transfer does not pass the legal estate until registration, and the registration after notice was void.

Mr. Amphlett, Q. C., and *Mr. C. C. Barber*, for the defendants, were not called upon.

VICE-CHANCELLOR SIR W. PAGE WOOD. It is impossible to give the plaintiff any relief against this transfer. It is a case of great hardship upon the plaintiff; but the defendant Smith does not appear to me to be in any way answerable for that. The shares stood in the name of Hills apparently as absolute owner; and he purported, as such owner, to transfer them to Smith by way of security. There is some obscurity in the evidence, as to whether Smith took the shares as representing the different clubs; but the real effect of the evidence is, I think, that the security was given personally to Smith himself, which somewhat simplifies the case. After the transfer was given to Smith, Hills continued to receive the dividends; and the arrangement seems to have been this: Smith being responsible to his societies for the money, required Hills to give him, by way of indemnity, such a power over the shares as would enable him, Smith, whenever he pleased, to make himself legal owner. That Hills did, by executing a transfer, and Smith allowed him to remain on the register and receive the dividends as long as he made no default in respect of the advances, being content as mortgagee with the power given to him of registering the transfer. When this arrangement was made, Smith had no notice of the trust; and, after having received notice, he registered the transfer. At the time of the transfer he acquired the power to register himself as owner of the shares. Hills could not displace the equity thus acquired, nor was anything further necessary to be done on his part to complete the transaction. Although it is true that, as between him and the company, Smith did not become the owner until after registration, nothing but his own act was necessary to make him complete master of the shares. His position was like that of a person to whom an estate is

¹ 10 Hare, 242.

² 14 Q. B. 205; 1 Atk. 382.

³ 1 D., J. & S. 149.

⁴ 1 J. & H. 721.

⁵ 3 K. & J. 617.

⁶ 1 Coll. 670.

conveyed, to become legally vested on the performance of some condition, such as the making of a demand, or the like; and in such a case, notice of a trust would not prevent the subsequent performance or effect of this condition.

It was suggested that the transfer could not be completed without a breach of trust; but that is not so. After the notice, Smith did not require Hills to commit any breach of trust, or to do anything. It is the case of a person advancing money on an equitable security without notice of a trust, and afterwards getting in the legal estate, and no more involves a breach of trust than when a mere incumbrancer gets in the legal estate as *tabula in naufragio*. As to the subsequent securities, it appears to me clear that the further advances were made on the faith of having the security of the shares. There has been no attempt to shake the evidence on this point by cross-examination. Some suggestion was made that the defendant was guilty of negligence, such as to fix him from the outset with notice of the trust. But there is no evidence of any negligence. The certificate showed only that Hills and another were once joint owners of the shares. Even if the fact of money being in the hands of two persons could be considered to be any kind of evidence of a trust, it would be most dangerous (especially in a case where the money has ceased to stand in two names) to say that a purchaser is thereby put upon inquiry. There was nothing to raise a legitimate suspicion in any one's mind. Nor is there anything in the fact that the mortgagor was left in the legal possession of the shares, and in the receipt of the dividends. Such a circumstance might be material in a case of bankruptcy, but that would be only under the doctrine of reputed ownership. There was nothing unreasonable in allowing the mortgagor to hold until it became necessary to enforce the power of taking actual possession.

The plaintiff is of course entitled to redeem, and there will be the usual decree for account and redemption.¹

¹ Redfearn v. Ferrier, 1 Dow, 50; 5 Pat. (Scotch) Ap. Cas. 707, s. c.; Brewster v. Sime, 42 Cal. 139; Thompson v. Toland, 48 Cal. 112; Winter v. Belmont, 53 Cal. 428, *accord*.

Donaldson v. Gillot, L. R. 3 Eq. 274, *contra*.

An analogy is believed to exist between the transfer of stock and a blank indorsement of a bill of exchange. Such an indorsement does not of itself vest the title to the bill in the transferee, but it gives him an irrevocable power of vesting the title in himself or any other person in whose name he may choose to fill out the blank indorsement. And clearly it would not be maintained that notice of an equity received before the indorsement was filled up would deprive the transferee of the privileges of a purchaser for value without notice. The same principle would apply to the transfer of a blank bill. See also *Re Tahiti Co.*, 17 Eq. 273. — ED.

THE DIRECTORS, &c. OF THE SHROPSHIRE UNION RAILWAYS AND CANAL COMPANY, PLAINTIFFS IN ERROR, v. THE QUEEN, ON THE PROSECUTION OF EMMA SARAH ROBSON, DEFENDANT IN ERROR.

IN THE HOUSE OF LORDS, MARCH 5, 9, 1875.

[*Reported in Law Reports, 7 House of Lords, 496.*]

THE LORD CHANCELLOR (Lord Cairns).¹ My Lords, if it were not for the very sincere respect which I entertain for the unanimous opinion of the learned judges of the Court of Exchequer Chamber,² I should have thought that this case was an extremely simple one, and that if it had fallen to be decided in one of the courts of equity, to whose administration the subject-matter more properly belongs, it could hardly have admitted of any serious argument.

My Lords, the prosecutor of the *mandamus* in this case was Mrs. Robson, the widow of one Christopher Robson. She came before the Court of Queen's Bench for the purpose of obtaining a *mandamus* to order the directors of the Shropshire Union Railways and Canal Company to transfer, in their books, into her own name, a sum of £3,712 10s. of their consolidated stock of 1854, which was then standing in the name of George Holyoake. She came with an instrument of transfer under the seal of Holyoake executed on the 5th of May, 1869; but that instrument of transfer was not executed until after notice had been given to her of the infirmity of her previous title. It is very properly admitted on both sides that the case must be dealt with as if it had fallen to be decided before that document had been executed.

Looking at the case as it stood before that document was executed, the facts which are clearly to be borne in mind are these: George Holyoake had standing in his own name (for I disregard the history of the period during which another name was associated with his) stock of the company to the value of £3,712 10s. Undoubtedly he held that stock as trustee for the defendants, and in no other character. The special case states that this stock was in his name in the year 1863, from which time he has held it "as trustee in trust for the Shropshire Union Railways and Canal Company, and in no other capacity whatsoever, and thenceforth from time to time all the dividends which have become payable on

¹ All that is material to the understanding of the case being contained in the judgment of the Lord Chancellor, the rest of the case is omitted. — Ed.

² L. R. 8 Q. B. 420. — Ed.

the stock were invested in the names of the chairman of the company and other directors thereof, who have held the same as trustees for the company."

It was perfectly legitimate that these defendants should own the stock. It is perfectly in accordance with law that they should have had that stock, which they could not hold in their own names, standing for them in the name of a trustee or in the names of trustees, and in that state of things undoubtedly the position of matters was, that the defendants had the whole beneficial interest in the stock belonging to and forming part of the property of the company. Theirs was the equitable title. Holyoake was a person who held merely the legal title and the right to transfer the stock. He was able, if not interfered with, to transfer the stock to any other person, and to give a valid receipt for the purchase-money to any person who had not notice of the beneficial interest of the defendants. On the other hand, any person with whom Holyoake might deal by virtue of his title upon the register, had, or ought to have had, these considerations present to his mind. He ought to have known that although Holyoake's name appeared upon the register as the owner of these shares, and although Holyoake could present to him the certificates of this ownership, still it was perfectly possible either that these shares were the beneficial property of Holyoake himself, or that they were the property of some other person. If he dealt merely by equitable transfer, or equitable assignment with Holyoake, and if it turned out that the beneficial ownership of Holyoake was coincident and coextensive with his legal title, well and good; his right would be accordingly, so far as Holyoake was concerned, complete. But if, on the other hand, it should turn out that Holyoake's beneficial interest was either *nil*, or was not coextensive with the whole of his apparent legal title, then I say any person dealing with Holyoake, by way of equitable bargain or contract, should have known that he could only obtain a title which was imperfect, and would not bind the real beneficial owner. And, my Lords, he also might have known, and should have known, this, that if he desired to perfect his title, and make it entirely secure, he had the most simple means open to him, — he had only to take Holyoake at his word. If Holyoake represented that he was the real owner of these shares, the proposed transferee had only to go with Holyoake, or to go with the authority of Holyoake in his possession, to the company, and to require a transfer of those shares from the name of Holyoake into his own name. If he had obtained that transfer, and the company had made it, no question could have arisen, and no litigation could subsequently have taken place.

That being the state of things, your Lordships have on the one hand the directors clearly the equitable owners of the stock in question. You have, on the other hand, Mr. Robson, the person dealing with Mr. Holy-

oake for an equitable charge, having in his power, if he was so minded, to obtain a perfectly valid legal charge, which would have made his title complete. Your Lordships have to deal with a case of a pre-existing and undoubted equitable title, and circumstances which are alleged to have defeated and to have taken away that pre-existing equitable title. My Lords, that pre-existing equitable title may be defeated by a supervening legal title obtained by transfer. And I agree with what has been contended, that it may also be defeated by conduct, by representations, by misstatements of a character which would operate and inure to forfeit and to take away the pre-existing equitable title. But I conceive it to be clear and undoubted law, and law the enforcement of which is required for the safety of mankind, that, in order to take away any pre-existing admitted equitable title, that which is relied upon for such a purpose must be shown and proved by those upon whom the burden to show and prove it lies, and that it must amount to something tangible and distinct, something which can have the grave and strong effect to accomplish the purpose for which it is said to have been produced.

I have anxiously striven to understand what were the circumstances or what was the line of conduct which is said in this case to operate to defeat the admitted equitable title, and I have been able to discover only four matters which are stated either separately or all together to have produced that effect.

My Lords, in the first place, the arguments at your Lordships' bar on behalf of the respondent appeared to me to go almost to this, that whenever you have an equitable owner who is the absolute owner, that is to say, entitled to the whole equitable interest, such a person ought not to have a trustee at all holding the *indicia* of legal ownership; or, if he chooses, for his own purpose, to have such a trustee, he must be in danger of suffering for every act of improper conduct by that trustee; and that, therefore, if the person entitled absolutely to the equitable interest in a share in a railway company, chooses for his own purpose to have that share standing in the name of a trustee for him, he will be bound not merely by a valid legal transfer of that share by the trustee, but by any equitable dealing or contract which the trustee may choose to enter into. My Lords, that is a very serious proposition. It goes not merely to shares, but it goes to land, and to every other species of property; and it goes to say that, whereas there is a large, well-known, recognized, and admitted system of trusts in this country, that system of trusts is to be cut down and moulded and reduced to this, that it is to be a system applicable only to infants, married women, or persons with limited interests; and that wherever the limited interest has ceased, and the equitable interest has become entire and complete without any limit, there the equitable owner is under some measure of obligation with regard to his duty of watching his trustee, an obligation which does

not lie upon a limited owner. I find no authority for such a proposition, and I feel satisfied that your Lordships will not be disposed to introduce, for the first time, that as a rule of law.

What was the next circumstance founded upon? It was this, that the equitable owners, the directors, allowed this stock to stand in one name only. My Lords, is the doctrine now to be introduced for the first time, that a *cestui que trust* who has one trustee only is to be bound to exercise a greater amount of vigilance or to take further precautions than he would have to take if he had two or three trustees? What, then, is to be said to the case of there being two or three trustees, and one becoming the survivor? Is there, then, to be a fresh duty cast upon the *cestui que trust*, which, if he does not perform, he is to be in some danger from the act of that one trustee, and in some way to be responsible for that act for which he would not be responsible if there had been more trustees than one? I know of no authority for that proposition, and I think your Lordships will not be prepared to introduce now for the first time that new rule of law.

What, my Lords, was the next circumstance that was founded upon? It was this, that this one trustee had previously committed a breach of trust, and that the breach of trust had been condoned by the *cestuis que trust*. No doubt that which was in the eye of any court a breach of trust had been committed. It had been observed by the *cestuis que trust*, and the attention of the trustee had been called to it. He gave to the *cestuis que trust* a reason, which your Lordships may think to have been satisfactory or unsatisfactory, but which in point of fact was accepted by the *cestuis que trust*. Their confidence in the trustee does not appear to have been shaken; they evinced that confidence by allowing him to replace the stock in his sole name, and to have it in his sole name. They could have had no sinister or improper object in that, and they gave by that the strongest proof that they were satisfied that their trustee ought not to be held to have forfeited their confidence. But, my Lords, I repeat that here again is a suggestion that a new rule, entirely unknown in courts of equity, so far as I am aware, should be introduced; namely, that persons claiming by a subsequent equitable title are to be allowed to displace a previous equitable title by entering upon a review of the previous conduct of the trustee who has created, or attempted to create, a second equitable title, and if they can find any previous misconduct by him, to found upon that previous misconduct some claim to displace the previous equitable title.

Then, my Lords, in the fourth place, this circumstance was relied upon, that the *cestuis que trust* had allowed the trustee to have possession of the certificates of the shares. Now, a certificate of the shares or stock of a railway company is merely a solemn affirmation under the seal of the company that a certain amount of shares or stock stands in the name

of the individual mentioned in the certificate. Undoubtedly the stock did stand in the name of Mr. Holyoake. If I am right, the directors were justified in having it in his name, and they were also justified in giving him the certificates, which did no more than tell that which any person would have found out by looking at their books; namely, that the stock stood in his name. It is said that there was some complete protection in the possession of the certificates, so that if the holder passed them over to another person, that other person would think he obtained a good title, because no transfer could be permitted without the production of the certificates. But, my Lords, whether a transfer should be permitted or not under those circumstances would be entirely within the discretion of the directors. They were not bound to permit a transfer without the production of the certificates; but, though not bound to permit a transfer, I apprehend they would not be in any way answerable if the transfer should be in any case made without the production of the certificates of the shares.

Therefore, my Lords, if we are to proceed, as your Lordships will proceed, upon the well-established system of trusts prevailing in this country, I cannot find that there was anything done by the *cestui que trust* in this case which ought to forfeit and displace that equitable title of which, as I began by saying, they were clearly possessed.

The case would be entirely different if any misstatement had been made by the directors, if anything had been said by them to Mr. Robson, or if anything had been placed by them on the face of any document stating something which was not the truth, upon the faith of which Mr. Robson might have acted. That was the question which came before the court in the case of *Rice v. Rice*,¹ referred to at your Lordships' bar, and which appears to have been an authority acted upon by the Court of Exchequer Chamber. There a vendor, who unquestionably would have been held to have, in the eye of the court of equity, a lien for his purchase-money, for some purpose indorsed upon the deed a receipt for that purchase-money, stating that it had been paid. That was just the same thing as if he had stated that he had not a lien, or that he did not wish to insist upon a lien for the purchase-money; and it would have been contrary to the first principles of equity, and, indeed, of common sense, to say that, after that deed had been given by him to the purchaser, and the purchaser armed with that deed had created an interest in some third party on the faith of that statement, the vendor could subsequently come forward, and, as against that third party, claim to be put in possession of that lien which by the indorsement of that receipt he had virtually surrendered.

My Lords, the case of *Waldron v. Sloper*,² which was decided by the same learned judge, is a case also entirely separate and distinct from the

¹ 2 Drew. 73.

² 1 Drew. 193.

present. There the incumbrancer, who had no interest whatever as a mortgagee, except by the delivery to him and the retainer by him of the title-deeds of the property, chose to give up those title-deeds. It is true that he gave them up upon an allegation that they were wanted for a temporary purpose; but in place of asking for them again, and of regaining the possession of them when that temporary purpose was satisfied, he allowed them to remain in the hands of the mortgagor for three or four years, and during that space of time, during which he was virtually leaving his security in the possession of another, that other by the possession of the title-deeds was enabled to create a fresh equitable mortgage, which was held, in consequence of the laches of the first mortgagee, to have priority over the first.

My Lords, neither of those cases has, as it appears to me, any application to the present. The present appears to me to be simply the case of an ordinary trustee holding property of the kind in question for a *cestui que trust*, and an incumbrance created by the trustee, which can only carry to that fresh incumbrancer such interest as the trustee could give. The trustee could not give an interest as against his *cestui que trust*, and therefore it appears to me that the incumbrancer, now represented by the plaintiff in the *mandamus*, is not entitled to have the transfer in the company's books of the stock in question.

I therefore submit to your Lordships, and move, that the decision of the Court of Exchequer Chamber should be reversed, and that the judgment on the motion for a *mandamus* should be entered for the defendants.¹

¹ Lord Hatherley and Lord O'Hagan delivered concurring opinions. Lord Hatherley said, p. 511: "In the eye of the court of equity the *cestuis que trust* (in this instance the defendants) are the owners of the property. Has that owner's right been forfeited? Mr. Robson has not acquired that ownership because he has not obtained a transfer, and he has acquired nothing that could pass to him any equitable right, nor can he claim it on any ground as a consequence of the conduct of the company. It may be (and authorities have been cited before us for the purpose of showing that it is so in Robson's case) that persons being real owners of an equitable interest may so conduct themselves as to hold out to third persons dealing with their trustee that they are not such equitable owners. Either they have parted with their interest, as in *Waldron v. Sloper*, 1 Drew. 193, where deeds had been parted with for four years, — deeds that constituted in fact Waldron's only title; or it might be, as in the case of *Rice v. Rice*, 2 Drew. 73, 23 L. J. Ch. 289, they may have represented that they had parted with their interest by signing a receipt for the purchase-money where their only interest was a lien on that purchase-money; or it might be in various other modes. The case of *Atwood*, a case of a different description from this, is another instance of such a representation being made. In one manner or another they may have so represented that they have parted with their equitable right and interest as to make it impossible for them again to set up that right against a person who has acquired a contradictory right upon the faith of that assertion and that representation."

Pinkett v. Wright, 2 Hare, 120; *Attorney-General v. Flint*, 4 Hare, 147, 156; *Manningford v. Toleman*, 1 Coll. 670; *Clack v. Holland*, 19 Beav. 262, 274 (*semble*).

(explaining *Martin v. Sedgwick*, 9 Beav. 333); *Roberts v. Croft*, 2 De G. & J. 1; *Stackhouse v. Jersey*, 1 J. & H. 721; *Cory v. Eyre*, 1 D., J. & S. 149 (*semble*); *Baillie v. McKewan*, 35 Beav. 177; *Newton v. Newton*, L. R. 4 Ch. Ap. 143; L. R. 6 Eq. 135, s. c. (*semble*); *Re Morgan*, 18 Ch. D. 93; *Winborn v. Gorrell*, 3 Ired. Eq. 117; *Anketel v. Converse*, 17 Ohio St. 11 (*semble*); *Wood v. Maitland*, 10 Phila. 84; 1 Leg. Chron. R. 348, s. c.; *Pinson v. Ivey*, 1 Yerg. 296, 338 (*semble*); *Craig v. Leiper*, 2 Yerg. 193; *Pillow v. Shannon*, 3 Yerg. 508; *Briscoe v. Ashby*, 24 Grat. 454 (*semble*), *accord*.

Similarly, if one who has given an equitable mortgage upon property should afterwards sell or mortgage the same property to another, who was content to advance his money without exacting a conveyance of the legal title from the mortgagor, the rights of the first equitable mortgagee would be paramount. *Tylee v. Webb*, 6 Beav. 552; *Stevens v. Stevens*, 2 Coll. 20; *Allen v. Knight*, 5 Hare, 272; 11 Jur. 527 (H. L.); *Hunt v. Elmes*, 2 D., F. & J. 578.

But if a *cestui que trust* or equitable mortgagee by words or conduct encourages the belief that the trustee or mortgagor is the absolute beneficial owner of the property, he will of course be estopped to assert the trust or mortgage against a subsequent equitable incumbrancer who has acted on the faith of such words or conduct. *Rice v. Rice*, 2 Drew. 73; *Worthington v. German*, 16 W. R. 187; *Layard v. Maud*, L. R. 4 Eq. 397; *Hunter v. Walters*, L. R. 7 Ch. Ap. 75; L. R. 11 Eq. 292, s. c. See also *Niven v. Belknap*, 2 Johns. 573; *Leach v. Ansbacher*, 55 Pa. 85.

PURCHASE FROM THE TRUSTEE OF A CHOSE IN ACTION. — A trustee of a chose in action cannot defeat the rights of his *cestui que trust* by an assignment to a purchaser for value without notice; for a chose in action not being assignable at law, the purchaser acquires only an equity, which, being subsequent, is necessarily postponed to the equity of the *cestui que trust*. *Moore v. Jervis*, 2 Coll. 60; *Brandon v. Brandon*, 7 D., M. & G. 365; *Cory v. Eyre*, 1 D., J. & S. 149; *Re European Bank*, L. R. 5 Ch. Ap. 358 (overdue bill); *Cowdrey v. Vandeburgh*, 101 U. S. 572 (*semble*); *Stafford v. Van Rensselaer*, Hopk. 569; 9 Cow. 316, s. c.; *Bush v. Lathrop*, 22 N. Y. 535 (*semble*); *Schafer v. Reilly*, 50 N. Y. 61; *Trustees v. Wheeler*, 61 N. Y. 88; *Greene v. Warnick*, 64 N. Y. 220; *Crane v. Turner*, 67 N. Y. 437; *Westbrook v. Gleason*, 79 N. Y. 23; *Decker v. Boice*, 83 N. Y. 215; *Downer v. South Royalton Bank*, 39 Vt. 25.

But see *contra*, *Porter v. King*, 1 Fed. Rep. 755 (*semble*); *Olds v. Cummings*, 31 Ill. 188, 192 (*semble*); *Sumner v. Waugh*, 56 Ill. 531, 538 (*semble*); *Silverman v. Bullock*, 98 Ill. 11; *Crosby v. Tanner*, 40 Iowa, 136 (overdue note); *Ohio Co. v. Rees*, 2 Md. Ch. 25, 37 (*semble*); *Bloomer v. Henderson*, 8 Mich. 395 (see *Terry v. Tuttle*, 24 Mich. 214); *Hibernian Bank v. Everman*, 52 Miss. 500 (overdue bill, *semble*); *Garland v. Harrison*, 17 Mo. 282; *Losey v. Simpson*, 3 Stockt. 246; *Woodruff v. Depue*, 1 McCart. 168; *Shannon v. Marselis*, Saxt. 413; *Starr v. Haskins*, 26 N. J. Eq. 414; *De Witt v. Van Sickles*, 29 N. J. Eq. 209 (*semble*); *Grocer's Bank v. Neet*, 29 N. J. Eq. 449 (*semble*) (but see *contra*, *Conover v. Van Mater*, 18 N. J. Eq. 481); *Mott v. Clarke*, 9 Barr, 399; *McConnell v. Wenrich*, 16 Pa. 365; *Hendrickson's Appeal*, 24 Pa. 363; *Wethrill's Appeal*, 3 Grant, 281; *Pryor v. Wood*, 31 Pa. 142; *Mullison's Estate*, 68 Pa. 212, 216; *Kountz v. Kirkpatrick*, 72 Pa. 376, 385; *Appeal of Mifflin Bank* (Pa. June, 1881), 25 Alb. L. J. 38; *Moore v. Holcombe*, 3 Leigh, 597 (*semble*). Most of the preceding cases *contra* were founded upon certain dicta of Mr. Chancellor Kent in *Murray v. Lylburn*, 2 Johns. Ch. 441, and *Livingston v. Dean*, 2 Johns. Ch. 479 (see also *James v. Morey*, 2 Cow. 247, 297); but these dicta have been expressly repudiated in New York. See cases cited *supra* in the preceding paragraph.

PURCHASE FROM THE FRAUDULENT ASSIGNEE OF A CHOSE IN ACTION. — If the owner of a chose in action is induced by fraud to assign the same, he will be precluded

from asserting his ownership against a subsequent purchaser for value without notice, the assignment being treated as a representation that the beneficial interest in the chose in action is vested in the fraudulent assignee. *Ashwin v. Burton*, 32 L. J. Ch. 196; *Talty v. Freedman's Co.*, 93 U. S. 321 (*semble*); *Cowdrey v. Vandenburg*, 101 U. S. 572 (*semble*); *Campbell v. Brackenridge*, 8 Blackf. 471 (*semble*); *Eversole v. Maule*, 50 Md. 95 (overdue bill); *Cochran v. Stewart*, 21 Minn. 435 (overdue bill); *Etheridge v. Gallagher*, 55 Miss. 458 (overdue bill); *International Bank v. German Bank*, 71 Mo. 183; *Putnam v. Clark*, 29 N. J. Eq. 412; *Grocer's Bank v. Neet*, 29 N. J. Eq. 449; *Moore v. Metropolitan Bank*, 55 N. Y. 41; *Combes v. Chandler*, 33 Ohio St. 178; *Taylor v. Gitt*, 10 Barr, 428; *State Bank v. Hastings*, 15 Wis. 75. See also *Eyre v. Burmester*, 10 H. L. C. 90, 110, per Lord Cranworth; but compare s. c. 103, per Lord Westbury.

But see *contra*, *Cockell v. Taylor*, 15 Beav. 103; *Parker v. Clarke*, 30 Beav. 54; *Barnard v. Hunter*, 2 Jur. N. s. 1213; *Poillon v. Martin*, 1 Sandf. Ch. 569; *Covell v. Tradesman's Bank*, 1 Paige, 131; *Bush v. Lathrop*, 22 N. Y. 535; *Cutts v. Guild*, 57 N. Y. 229. See also *Donnell v. Thompson*, 13 Ala. 440; *Blackman v. Lehman*, 63 Ala. 547. — ED.

NOTE.

WHEN TRUST PROPERTY IS INCLUDED IN A GENERAL CONVEYANCE OR DEVISE BY A TRUSTEE.

WHETHER a general conveyance or devise by a trustee is confined in its operation to property in which the trustee has a beneficial interest, or includes also property held by him simply as trustee, is a question of intention to be gathered from the whole scope of the deed or will.

CONVEYANCE INTER VIVOS. — In *Fausset v. Carpenter*, 5 Bligh, N. S. 75; 2 Dow & Cl. 232, S. C.; *Anderson v. Raikes*, 1 Stark. 155; *Abbot*, 55 Me. 580, it was decided that the legal title to trust property did not pass by a general conveyance by the trustee. This interpretation was adopted upon the ground that an intention to commit a breach of trust should not be imputed to the trustee without express evidence of such an intention. The case of *Fausset v. Carpenter* is criticised, however, with some severity in *Sugden's Law of Property*, 76.

WILLS. — On the other hand, the legal title to trust property will pass by a general devise by the trustee, unless the will discloses an intention to restrain its operation to property in which the testator had a beneficial interest. *Marlow v. Smith*, 2 P. Wms. 198; *Ex parte Sergison*, 4 Ves. 147 (*semble*); *Braybrooke v. Inskip*, 8 Ves. 417 (overruling *Attorney-General v. Buller*, 5 Ves. 339); *Ex parte Shaw*, 8 Sim. 159; *Bainbridge v. Ashburton*, 2 Y. & C. Ex. 347; *Sharpe v. Sharpe*, 12 Jur. 598; *Langford v. Auger*, 4 Hare, 313; *Lewis v. Mathews*, L. R. 2 Eq. 177; *Taylor v. Benham*, 5 How. 233, 270; *Richardson v. Woodbury*, 43 Me. 206 (*semble*); *Ballard v. Carter*, 5 Pick. 112 (*semble*); *Wills v. Cooper*, 1 Dutch. 137 (*semble*); *Jackson v. Delancy*, 13 Johns. 537; *Merritt v. Farmers' Co.*, 2 Edw. 547 (*semble*); *Heath v. Knapp*, 4 Barr. 228.

Any disposition of the property, however, which would be improper unless the testator had the beneficial interest therein, is sufficient to exclude trust property from the operation of the will; *e. g.*: —

A Devise subject to Debts, Annuities, or Legacies. — *Reade v. Reade*, 8 T. R. 118; *Ex parte Morgan*, 10 Ves. 101; *Rackham v. Siddall*, 16 Sim. 297; 1 McN. & G. 607, S. C.; *Doe v. Lightfoot*, 8 M. & W. 553 (*semble*); *Hope v. Liddell*, 21 Beav. 183; *Life Association v. Siddal*, 3 D., F. & J. 58; *Re Smith's Estate*, 4 Ch. D. 70; *Re Bellis's Trusts*, 5 Ch. D. 504 (impugning *Re Brown*, 3 Ch. D. 156, *contra*).

A Devise upon Trust to sell. — *Ex parte Marshall*, 9 Sim. 555; *Re Morley's Will*, 10 Hare, 293; *Re Packman*, 1 Ch. D. 214; *Re Smith's Estate*, 4 Ch. D. 70; *Surrey Co. v. Kerr*, W. N. (1878), 163 (but see *Wall v. Bright*, 1 J. & W. 494, criticised in *Lysaght v. Edwards*, 2 Ch. D. 499); *Richardson v. Woodbury*, 43 Me. 206; *Merritt v. Farmers' Co.*, 2 Edw. 547.

A Devise to several as Tenants in Common. — *Martin v. Laverton*, L. R. 9 Eq. 563, 568 (*semble*). See *Doe v. Lightfoot*, 8 M. & W. 553; *Re Morley's Will*, 10 Hare, 293; *Re Finney's Estate*, 3 Giff. 465; *Thirtle v. Vaughan*, 2 W. R. 632; 24 L. Times, 5, S. C.

A Devise to Several Persons with a Right of Accruer. — *Thirtle v. Vaughan*, 2 W. R. 632; 24 L. Times, 5, S. C. See also *Ex parte Brettell*, 6 Ves. 576 (explained in 8 Ves. 434).

A Devise to an Unascertained Class. — *Re Finney's Estate*, 3 Giff. 465.

A Devise to the Separate Use of a Woman. — *Lindsell v. Thacker*, 12 Sim. 178.

A Devise in Strict Settlement. — *Thompson v. Grant*, 4 Mad. 438.

A Devise to the Cestui que Trust being an Infant. — *Wills v. Cooper*, 1 Dutch. 137.

GENERAL CONVEYANCE OR DEVISE BY A MORTGAGEE. — The legal title to mortgaged property will of course pass by a general conveyance or devise by the mortgagee, unless a contrary intention appears by the deed or will. *Sir Thomas Littleton's Case*, 2 Vent. 351; *Ex parte Bowes*, 1 Atk. 605, n. 1; *Ballard v. Carter*, 5 Pick. 112. Furthermore, as a mortgagee, unlike a trustee, has a beneficial interest in the property, the legal title will pass notwithstanding the property is conveyed or devised subject to a charge for the payment of debts, legacies, or annuities. *Wynn v. Littleton*, 1 Vern. 3; 1 Atk. 605, n. 1, s. c.; *Re Stevens*, L. R. 6 Eq. 597; *Lewin, Trusts* (7th ed.), 209, 210. See also *Re Smith's Estate*, 4 Ch. D. 70, 72. But see *contra*, *Doe v. Lightfoot*, 8 M. & W. 553; 1 *Jarman, Wills* (4th ed.), 701.

In the following cases the terms of the will were thought to be inconsistent with an intention of the mortgagee to dispose of the legal title to the mortgaged property; *e. g.*:

A Limitation of the Property in Strict Settlement. — *Braybrooke v. Inskip*, 8 Ves. 434 (*semble*); *Thompson v. Grant*, 4 Mad. 438; *Galliers v. Moss*, 9 B. & C. 267 (but see *Ex parte Bowes*, 1 Atk. 605, n. 1).

A Devise to an Unascertained Class. — *Re Finney's Estate*, 3 Giff. 465.

A Devise upon Special Trusts. — *Re Horsfall*, McCl. & Y. 292; *Martin v. Laverton*, L. R. 9 Eq. 563; *Re Packman*, 1 Ch. D. 214. See also *Leeds v. Munday*, 3 Ves. Jr. 348; *Breckinridge v. Waters*, 4 Dana, 620.

It is hardly necessary to add, that when the legal title to trust property passes by the will of the trustee, the devisee takes the same subject to the trust. *Marlow v. Smith*, 2 P. Wms. 201; *Grenville v. Blyth*, 16 Ves. 231. — ED.

SECTION III.

What Interest in Trust Property passes to the Heir or Representative of a Trustee.

ANONYMOUS.

IN THE —, TRINITY TERM, 1468.

[*Reported in Year Book, 8 Edward IV., folio 6, placitum 1.1*]

AND it was moved whether a subpœna would lie against an executor or heir. And CHOKE, J., said that he had formerly sued a subpœna against the heir of a feoffee, and the matter was long debated. And the opinion of the Chancellor and the justices was that it did not lie against an heir, and so he sued a bill to Parliament.

Fairfax. This matter is a good stem for discussion when the others come, &c.²

¹ Ellesmere, Office of Chancellor, 86, pl. 26, s. c., to which report the author adds : "Note that it must be intended that the heir had not this land, but that the land was sold before by the feoffee to a stranger ; for if the heir had the land, he is liable to the trust as well as the feoffee." See also Cary, 16 ; Ellesmere, Office of Chancellor, 94, pl. 49. — ED.

² "THE CHANCELLOR said (in 1482) that it is the common course in the chancery to grant [subpœna?] against an obligation and so upon a feoffment in trust when the heir of the feoffee is in by descent or otherwise, for we find records of this in the chancery. HUSE, C. J. When I first came to court, thirty years ago, it was agreed in a case by all the court that if a man had enfeoffed another in trust, if the latter died seised so that his heir was in descent, that then no subpœna would lie ; and there is great reason why this should be so, for if by means of a subpœna you may disprove a descent by two proofs in chancery, you may disprove twenty descents, which is contrary to reason and conscience. And therefore it seems to me less of an evil to make him who suffers his feoffee to die seised of his land, lose it, than to disinherit several by proofs in the chancery. . . . To which the CHANCELLOR said, then it is great folly to enfeoff others of my land," &c. Y. B. 22 Ed. IV. fol. 6, pl. 18.

"VAVASOUR, J., said (in 1501) that the subpœna commenced in the time of Edward III., but this was always against the feoffee upon confidence himself, for against his heir the subpœna was never allowed until the time of Henry VI., and in this point the law was changed by Fortescue, C. J." Keil. 42, pl. 7.

"NOTE, that a subpœna lies against the heir of the feoffee who survives." Fitzh. Abr. Subpœna, pl. 14, citing Y. B. 14 Ed. IV. (1474).

It seems almost superfluous to state at the present day that the heir of an intestate trustee takes the legal title to trust property subject to the trust. *Fleeming v. Howden*, L. R. 1 Sc. App. 372 ; *Waggener v. Waggener*, 3 Monr. 542 ; *Schenck v. Schenck*, 16 N. J. Eq. 174 ; *Boston Co. v. Condit*, 19 N. J. Eq. 394 ; *Zabriskie v. Morris Co.* 33 N. J. Eq. 22 ; *Jenks v. Backhouse*, 1 Binn. 91 ; *Watkins v. Specht*, 7 Coldw. 585.

WESTON v. DANVERS.

IN CHANCERY, 1584.

[*Reported in Tothill*, 105.]

THE heire is not in equitie bound to assure lands which his father bargained and tooke money for.

If the trust property is personal, the executor or administrator of the trustee takes the legal title subject to the trust. *Deering v. Torrington*, 1 Salk. 79; *Wheatley v. Purr*, *supra* p. 26; *Trecothick v. Austin*, 4 Mason, 16, 29; *Mauldin v. Armistead*, 14 Ala. 702; *Powell v. Knox*, 16 Ala. 364; *Keister v. Howe*, 3 Ind. 268; *Schenck v. Schenck*, 16 N. J. Eq. 174; *Dias v. Brunell*, 24 Wend. 9; *Moses v. Murgatroyd*, 1 Johns. Ch. 119; *De Peyster v. Ferrers*, 11 Paige, 13; *Banks v. Wilkes*, 3 Sandf. Ch. 99; *Bucklin v. Bucklin*, 1 Abb. App. 242; *Bunn v. Vaughan*, 1 Abb. App. 253; *Emerson v. Bleakley*, 2 Abb. App. 22; *Re Howell*, 61 How. Pr. 179; *Boone v. Citizens' Bank*, 84 N. Y. 83; *Wetmore v. Hageman* (N. Y. Ct. App. 1882), 25 Alb. L. J. 235.

If one of several co-trustees dies, the legal title survives to the others. Co. Lit. 113; *Billingsley v. Mathew*, Toth. 168; *Gwilliams v. Rowel*, Hard. 204; *Hudson v. Hudson*, Talb. 127, 129; *Atty.-Gen. v. Glegg*, Amb. 584; *Warburton v. Sandys*, 14 Sim. 622; *Read v. Godwin*, 1 D. & Ry. 259; *Watson v. Pearson*, 2 Ex. 581; *Lane v. Debenham*, 11 Hare, 188; *Wheatley v. Boyd*, 7 Ex. 20; *Richeson v. Ryan*, 15 Ill. 13; *Gray v. Lynch*, 8 Gill, 403; *Webster v. Vandeventer*, 6 Gray, 428 (*semble*); *Stewart v. Pettus*, 10 Mo. 755; *Wills v. Cooper*, 1 Dutch. 137; *Shook v. Shook*, 19 Barb. 653; *Shortz v. Unangst*, 3 Watts & S. 45; *Nichols v. Campbell*, 10 Grat. 560. — ED.

SECTION IV.

What Interest in Trust Property passes to the Assignee of a Bankrupt Trustee.

CARPENTER AND OTHERS, ASSIGNEES OF FOWLER, A BANKRUPT, v. MARNELL.

IN THE COMMON PLEAS, FEBRUARY 10, 1802.

[*Reported in 3 Bosanquet & Puller, 40.*]

ASSUMPSIT on a note in these words: "I promise to pay to Mr. Joseph Fowler or order the sum of £150, being the remainder of the consideration for the assignment of his interest in the Layton business to me, as soon as I shall receive or may receive the money due upon the completion of the said business from T. B., Esquire, his executors, administrators, or assigns, or immediately upon my receiving letters of administration of the estate and effects of Lieutenant-General Joseph Walton, otherwise Brome, deceased, whichever event shall first take place." Signed, "Richard Marnell." This note was indorsed by Fowler to one James Bagster for a valuable consideration, after which Fowler became bankrupt and the plaintiffs were chosen his assignees; in which capacity they now sued for the benefit of Bagster.

The cause was tried before Lord Alvanley, C. J., at the Westminster Sittings after Michaelmas Term, and a verdict was found for the plaintiffs subject to the opinion of the court whether the action was maintainable by them as assignees of Fowler.

A rule *nisi* having been obtained on a former day for setting aside the verdict, and entering a nonsuit,

Best and *Onslow*, Serjts., now showed cause, and insisted that the action was well brought by the plaintiffs as assignees of Fowler; that as the note was not negotiable the action could not have been maintained by Bagster himself, and though it might possibly have been sustained if brought by Fowler, yet it did not follow that it might not also be brought by the assignees, for that there were many cases where an action might be sustained either by the bankrupt himself or by his assignees; as in *Fowler v. Down*¹ and *Webb v. Fox*,² by which it was established that an uncertificated bankrupt or his assignees might maintain actions relative to property acquired subse-

¹ 1 Bos. & Pul. 44.

² 7 T. R. 391, and the several cases there cited.

quent to the bankruptcy; that the only cases which tended to show that the action was not well brought were *Winch v. Keeley*¹ and *Bottomley v. Brook*;² but that in both those cases it appeared upon the record that the plaintiffs were not beneficially interested in the instruments upon which they sued, and as at that time the precise point there determined was considered as new, and Lord Kenyon had in a subsequent case of *Bauerman v. Radenius** laid it down as clear that courts of law can only take notice of legal rights, the court in this case, which did not fall precisely within the authority of *Winch v. Keeley* or *Bottomley v. Brook*, would not extend the equitable doctrines there adopted. They observed that it appeared to have been the opinion of Lord Hardwicke, that a legal estate in the trust property of a bankrupt passed to his assignees, since he thought it necessary to direct, in the case *Ex parte Newton*,⁴ that where an assignee is removed on account of his own bankruptcy, not only he but his assignees should join with the commissioners in executing the assignment to the new assignees.

Shepherd, Serjt., *contra*, contended that, where a bankrupt is interested as a mere trustee, the debt does not pass under the commission; that this point was expressly decided in *Winch v. Keeley*, in which case the bankruptcy of the plaintiff having been pleaded, the plaintiff replied that he was a trustee, and upon demurrer that replication was held good; that in the present case the defendant could not have stated the special facts upon the record, since it would only have amounted to the general issue, which is, that the assignees have not nor ever had any right of action; and that as nothing ever passed to the assignees in the note upon which this action was founded, it was impossible to contend with any success that either they or the bankrupt might maintain the action.

LORD ALVANLEY, C. J. We are all of opinion that this action ought to have been brought by Fowler. He was the person to whom the promise to pay was made; he by his indorsement directed the contents of the note to be paid to Bagster, and though this indorsement had no legal effect, yet it passed the beneficial interest in the note to Bagster, and Fowler by the indorsement became a mere trustee for him. The assignees never were in a situation to derive any benefit from this piece of paper. If indeed they had possessed the most remote possibility of interest, or if they could state anything from which a benefit to the creditors would result, I should hold that the action might be maintained; but at the time when they brought this action it was impossible for them not to know that they had no right to the note. They bring the action in the character of trustees; but they are not trustees

¹ 1 T. R. 619.

² 22 Geo. III. C. B., cit. 1 T. R. 621.

³ 7 T. R. 663.

⁴ 1 Atk. 97.

for Bagster; they are only trustees for Fowler's creditors, and therefore cannot sustain this action.

HEATH, J., expressed himself of the same opinion, and observed that Lord Hardwicke's direction was only in *majorem cautelam*.

ROOKE and CHAMBRE, JJ., concurred.

*Rule absolute.*¹

¹ Scott v. Surman, Willes, 400, 402 (*semble*); *Ex parte* Chion, 3 P. Wms. 187, n. (A); *Ex parte* Dumas, 2 Ves. 582; Winch v. Keeley, 1 T. R. 619; Gladstone v. Hadwen, 1 M. & S. 517; *Ex parte* Gennys, Mont. & M. 258; *Ex parte* Painter, 2 D. & C. 584; Leslie v. Guthrie, 1 B. N. C. 697; Dangerfield v. Thomas, 9 A. & E. 292; Parnham v. Hurst, 8 M. & W. 743; Boddington v. Castelli, 1 E. & B. 879; Westoby v. Day, 2 E. & B. 605, 624; Houghton v. Koenig, 18 C. B. 235; Fleeming v. Howden, L. R. 1 Sc. Ap. 372; St. 32 & 33 Vict. c. 71, § 15; U. S. Rev. St. § 5053; Hosmer v. Jewett, 6 Ben. 208; Butler v. Merchants' Co., 14 Ala. 777, 798; Boon v. Stone, 8 Ill. 537; Rhoades v. Blackiston, 106 Mass. 334; Faxon v. Folvey, 110 Mass. 392; Chace v. Chapin, 130 Mass. 128; Kip v. Bank of N. Y., 10 Johns. 63; Dexter v. Stewart, 7 Johns. Ch. 52; Hopkins v. Banks, 7 Cow. 650; Ontario Bank v. Mumford, 2 Barb. Ch. 596; Blin v. Pierce, 20 Vt. 25, *accord*.

Similarly the assignees of a bankrupt executor do not take the legal title to the assets of the testator. *Ex parte* Ellis, 1 Atk. 101; *Ex parte* Butler, 1 Atk. 210, 213; Note per Lord Mansfield, 3 Burr. 1369; Farr v. Newman, 4 T. R. 629, per Grose, J.; Viner v. Cadell, 3 Esp. 88.

If a bankrupt who holds the legal title to property has also a share in the beneficial interest therein, the legal title, it is said, passes to his assignee in bankruptcy. Burn v. Carvalho, 4 B. & Ad. 382; 1 A. & E. 883; 4 M. & Cr. 695, s. c.; Leslie v. Guthrie, 1 B. N. C. 697 (*semble*); Dangerfield v. Thomas, 9 A. & E. 292 (*semble*); Parnham v. Hurst, 8 M. & W. 743 (*semble*); Boddington v. Castelli, 1 E. & B. 879 (*semble*); Rhoades v. Blackiston, 106 Mass. 334 (*semble*); Swepson v. Rouse, 65 N. Ca. 34. But this rule should not apply where the bankrupt is expressly a trustee. Lewin, Trusts (7th ed.), 220, 221; Webster v. Scales, 4 Doug. 7.

Wherever the assignee of a bankrupt trustee does acquire the legal title, he takes it of course subject to the same equities to which it was subject in the hands of the trustee. Taylor v. Wheeler, 2 Vern. 564; Tyrrell v. Hope, 2 Atk. 558; *Ex parte* Coysegame, 1 Atk. 192; *Ex parte* Dumas, 2 Ves. 582, 585; Hinton v. Hinton, 2 Ves. 631, 633; Bowles v. Rogers, 6 Ves. 95, n. (55); Mitford v. Mitford, 9 Ves. 87, 100; Mestaer v. Gillespie, 11 Ves. 621, 624; *Ex parte* Hanson, 12 Ves. 346, 349; *Ex parte* Herbert, 13 Ves. 183, 188; Grant v. Mills, 2 V. & B. 306, 309; Waring v. Coventry, 2 M. & K. 406; Jones v. Mossop, 3 Hare, 568, 572; Frith v. Cartland, 2 H. & M. 417; Fleeming v. Howden, L. R. 1 Sc. Ap. 372; *Ex parte* Rabbidge, 8 Ch. D. 367; Harris v. Truman, 7 Q. B. D. 340, 356; Cook v. Tullis, 18 Wall. 332; Yeatman v. Savings Inst., 95 U. S. 767; Dayton Bank v. Merchants' Bank (U. S.), 12 Reporter, 634; Chace v. Chapin, 130 Mass. 128; *Re* Howe, 1 Paige, 125, 128; Ludwig v. Highley, 5 Barr, 132, 138 (*semble*).

The rule is the same where a trustee makes an assignment of trust property for the benefit of his creditors. Frow v. Downman, 11 Ala. 880; Walker v. Miller, 11 Ala. 1067; Willis v. Henderson, 5 Ill. 13; O'Hara v. Jones, 46 Ill. 288; Roberts v. Corbin, 26 Iowa, 315; Kayser v. Heavenrich, 5 Kan. 324, 340; Corn v. Sims, 3 Met. (Ky.) 391; Pierson v. Manning, 2 Mich. 445 (overruling Hollister v. Loud, 2 Mich. 309); Flanigan v. Lampman, 12 Mich. 61; Clarke v. Flint, 22 Pick. 231; Chace v. Chapin, 130 Mass. 128; Haggerty v. Palmer, 6 Johns. Ch. 437; *Re* Howe, 1 Paige, 125; Slade v. Van Vechten, 11 Paige, 21; Griffin v. Marquardt, 17 N. Y. 28; Van Heusen v.

SECTION V.

What Interest in Trust Property can be reached by Creditors of the Trustee.

WORRALL v. HARFORD.

IN CHANCERY, BEFORE LORD ELDON, C., NOVEMBER 1, 1802.

[Reported in 8 Vesey, 4.]

THE bill stated that in and previous to the year 1769 Edward Lloyd and William James, of Bristol, carried on business as merchants and

Radcliff, 17 N. Y. 580 (overruling opinion of Kent, C., in *Dey v. Dunham*, 2 Johns. Ch. 182, 188); *Bliss v. Cottle*, 32 Barb. 322; *Reed v. Sands*, 37 Barb. 185; *Kraft v. Dulles*, 2 Cincin. S. C. R. 116; *Mellon's App.*, 32 Pa. 121; *Williams v. Winsor*, 12 R. I. 9; *Plumkett v. Carew*, 1 Hill, Ch. 169. But see *contra*, *Wickham v. Martin*, 13 Grat. 427; *Evans v. Greenhow*, 15 Grat. 153.

PROPERTY IN THE ORDER AND DISPOSITION OF A BANKRUPT TRUSTEE. — Trust property in the possession of the trustee does not pass upon his bankruptcy to his assignees under the English bankruptcy acts as property left in the order and disposition of the bankrupt by the consent and disposition of the true owner. *Copeman v. Gallant*, 1 P. Wms. 314; *Joy v. Campbell*, 1 Sch. & Lef. 328; *Ex parte Horwood*, Mont. & M. 169; Mont. 24; *Ex parte Thomas*, 3 M., D. & D. 40, 48 (*semble*); *Ex parte Geaves*, 8 D., M. & G. 291; *Re Bankhead's Trust*, 2 K. & J. 560; *Great Eastern R. R. v. Turner*, L. R. 8 Ch. Ap. 149 (explaining and distinguishing *Ex parte Burbridge*, 1 Dea. 131; s. c. sub nom.; *Ex parte Watkins*, 2 Mont. & A. 348; *Ex parte Ord*, 2 Mont. & A. 724). In *Re Bankhead's Trust*, *supra*, Sir W. Paige Wood, V. C., said, p. 565: "If you once get a sufficient declaration of trust by a party who is the sole trustee, he is the proper person to be in possession of the policy, — in other words, he is the 'true owner,' within the meaning of the act; and he being also in the reputed possession of the property when the bankruptcy takes place, there is no separation of interest, — the true owner and the reputed owner are the same person."

But the assignee of a chose in action or equitable interest, on the other hand, is regarded as the "true owner" within those acts. Accordingly, if the assignee fails to notify the obligor of the assignment, the chose in action or other interest assigned will pass upon the bankruptcy of the assignor to the latter's assignees in bankruptcy, and that, too, although the instrument containing the obligation was delivered to the assignee at the time of the assignment. (It was held, indeed, by Sir R. Malins, V. C., in *Stuart v. Cockerell*, L. R. 8 Eq. 607, and *Official Liquidators v. Carter*, 20 W. R. 354, that the assignees in bankruptcy would forfeit the property, if the prior assignee should, even after the bankruptcy, anticipate them in giving notice to the obligor; but these decisions, it is fair to suppose, would not be followed); *e. g.*: —

Policies of Insurance. — *Williams v. Thorpe*, 2 Sim. 257; *Ex parte Colville*, 2 Sim. 570; *Ex parte Tennyson*, Mont. & B. 67; *Ex parte Carbis*, 4 D. & C. 354; *Duncan v. Chamberlayne*, 11 Sim. 123 (*semble*); *Re Hennessy*, 2 Dr. & War. 555; *West v. Reid*, 2 Hare, 249; *Ex parte Arkwright*, 3 M., D. & D. 129; *Thompson v. Speirs*, 13 Sim.

copartners; and the plaintiff was employed by them as their attorney and solicitor in all their legal business, and in procuring for them money on their bond; that Lloyd dying, and James sinking in credit, the plaintiff was employed to issue a commission of bankruptcy against him: and in or about February, 1771, struck a docket on the petition of Nathaniel Stephens; and was directed to summon, and did summon, a meeting of the creditors; when it was agreed that James should execute a deed of assignment for the benefit of all said creditors, to be prepared by the plaintiff; and accordingly by indenture, prepared by the plaintiff, and bearing date the 15th of January, 1772, it was witnessed, that William James did assign, transfer, and make over to defendants all the joint or copartnership stock in trade, upon trust to sell and dispose thereof; and thereout in the first place to pay the

469; *Edwards v. Martin*, L. R. 1 Eq. 121; *Re Webb's Policy*, 15 W. R. 529; *Green v. Ingham*, L. R. 2 C. P. 525; *Ex parte Caldwell*, L. R. 13 Eq. 188.

The cases of *Falkener v. Case*, 2 T. R. 491, cited; 1 Bro. C. C. 125, s. c.; and *Bozon v. Bolland*, cited Mont. & B. 74, and 11 Sim. 124 (*semble*), are overruled.

But see for the present state of the law, *Ex parte Ibbetson*, 8 Ch. D. 519.

If a policy of insurance is deposited merely as a lien and not as an assignment, the depositary may hold it against the depositor's assignees in bankruptcy. *Gibson v. Overbury*, 7 M. & W. 555; *Green v. Ingham*, L. R. 2 C. P. 525.

Shares in a Company. — *Ex parte Vallance*, 3 Mont. & A. 224; *Ex parte Harrison*, 3 Dea. 185; 3 Mont. & A. 506, s. c. (*semble*); *Ex parte Richardson*, 3 Dea. 496 (*semble*); *Ex parte Boulton*, 1 De G. & J. 163; *Ex parte Stewart*, 1 L. J. Ch. Rep. 554 (*semble*); *Ex parte Union Bank*, L. R. 12 Eq. 354.

Bonds, Covenants, or Non-negotiable Notes. — *Ex parte* (*semble*); *Swanck*, 300; *Gardner v. Lachlan*, 4 M. & Cr. 129; *Belcher v. Campbell*, 8 Ch. D. 519.

Debts. — *Jones v. Gibbons*, 9 Ves. 407 (*semble*); *Doug. & Osborne*, 1 Gl. & J. 358. But see *contra*, and overruled, *Unwin v. Grosvenor*, *Wentworth*; *Ex parte Byas*, 1 Atk. 124.

Equitable Interests. — *Smith v. Smith*, 2 Cr. & M. 101 (*semble*); *Bartlett v. Bartlett*, 1 De G. & J. 127; *Day v. Day*, 1 De G. & J. 144; *Re Vickress's Trusts*, 7 W. R. 542; *Re Rawbone's Trusts*, 3 K. & J. 476 (reversing s. c. 3 K. & J. 300); *Rickards v. Gledstanes*, 3 Giff. 298; *Re Hughes's Trusts*, 2 H. & M. 89; *Re Tichener*, 35 Beav. 317; *Hensley v. Wills*, W. N. (1867) 172; *Daniel v. Freeman*, 11 Ir. R. Eq. 233. But see *contra*, and overruled, *Re Pole's Trust*, 2 Jur. n. s. 685.

The rule above stated has been recently changed by St. 32 & 33 Vict. s. 15, subs. 5, as to choses in action. *Re Pryce*, 4 Ch. D. 685; *Re Irving*, 7 Ch. D. 419; *Ex parte Ibbetson*, 8 Ch. D. 519. But shares in a company are not choses in action within the late act. *Ex parte Union Bank*, L. R. 12 Eq. 354.

Sufficient Notice. — Mailing a notice has been decided to be enough to protect the interest of the assignee. *Belcher v. Bellamy*, 2 Ex. 303; *Re Hickey*, 10 Ir. R. Eq. 117; *Daniel v. Freeman*, 11 Ir. R. Eq. 233 (*semble*). See also *Burn v. Carvalho*, 4 M. & Cr. 703, 704.

In the United States the "order and disposition" clause of the English bankruptcy acts has not been adopted. Accordingly, if the assignor of a chose in action, or other interest, becomes bankrupt after the assignment, the party claiming thereunder will be preferred to the assignees in bankruptcy of the assignor. *Blouin v. Hart*, 30 La. An. 714; *Dickinson v. Central Bank*, 129 Mass. 279. But see *contra*, *Shipman v. Aetna Bank*, 29 Conn. 245. — ED.

expenses attending the application for said commission of bankruptcy, and also all the costs and charges of said deed and other incidental charges and expenses of the trust; and to pay and reimburse themselves all such costs, charges, damages, and expenses which they should be put unto in the management and execution of said trust; and said defendants covenanted that they should make sale of said partnership effects, and get in all debts due to said copartnership; and further, that they should, as often as such moneys should, after deducting the payments to be made thereout as aforesaid, and reserving a sufficient sum to answer the further probable contingent expenses of the trust, amount to a competent sum to pay one shilling in the pound, pay the same equally amongst the said creditors according to their respective demands.

The bill further stated, that the affairs of said partnership being very intricate, and there being various legal proceedings, and particularly an appeal from one of his Majesty's courts in America, plaintiff was directed by said defendants to conduct such appeal on their behalf, and generally to manage and direct the legal business relating to said partnership, and the trusts of the deed; and the plaintiff from time to time prepared deeds relating to said trust affairs, and prosecuted the appeal, and disbursed various sums, and took various journeys, and had and made various attendances on account of the trustees; and by his exertions and labor, and the sums expended by him, the defendants became indebted to the plaintiff in a considerable sum. Upon the execution of the trust deed the trustees proceeded to act in the trust; but the whole of such partnership debts and credits have never been finally settled, nor have all the trusts of said deed been performed and the accounts closed. The plaintiff hath delivered in bill of costs and disbursements paid and incurred by him as solicitor under the trust deed, and received some sums upon account from the said trustees; but he hath never settled any account with said trustees, and the whole of such bills have never been paid. James is long since deceased; and the defendants, the surviving trustees, have never made any final dividend; and the plaintiff, as solicitor of said trustees, having a considerable demand upon them, as before mentioned, frequently applied, and requested them to come to an account of said trust estate possessed or received by them under the deed, and to apply out of the balance in their hands a sufficient sum to discharge the bills and demands of plaintiff, and particularly on or about the 9th January, 1784, 19th November, 1787, 24th April, 1790, 15th November, 1790; and at several times since, said William James made applications to them for the same purpose. The bill then charged that a considerable balance, amounting to £80 9s. 3d. remains due to him as such solicitor; and though many years have elapsed since the execution of the deed, yet that plaintiff hath

continued from the date thereof nearly to the present time to act as solicitor thereto, and hath delivered bills of costs to the said defendants, and made applications for payment; that his debt ought not to be considered as a simple-contract debt, as it is by the deed in the first place provided that the trustees shall out of the moneys to come to their hands pay and discharge the expenses of the commission of bankruptcy, and also all costs and charges of that deed, and also all other incidental charges and expenses relating to the execution of the trust thereof; and in the next place, that the trustees should pay and reimburse themselves all their costs and charges relative thereto; and therefore his demand ought to be considered as a specialty debt, and the plaintiff had a lien upon the trust estate for his costs and charges.

The prayer of the bill was, that the plaintiff may be declared a creditor under the trust deed for the amount of his bills of fees; that the defendants may account for all and every the sums received by them, and for the application; and that they may be decreed thereout to pay to the plaintiff the sum of £80 9s. 3d., &c.

To this bill the defendants, the surviving trustees, put in a general demurrer.

Mr. Richards and *Mr. Hart*, in support of the demurrer, said, this was a perfectly novel attempt; and they represented the mischievous consequences, if all persons employed by trustees, surveyors, &c., might come as creditors upon the fund for an administration, and to have everything undone; insisting that they must look to the trustees, who employed them. At least they must state some case, as that the trustees are insolvent.¹

Mr. Romilly and *Mr. Martin*, for the plaintiff, insisted that the plaintiff had a right as a creditor upon the fund for the whole of his demand; admitting, however, that there was no instance of such an equity.

THE LORD CHANCELLOR [ELDON]. This case must be determined upon the contents of this particular deed, with some attention to the nature of trust deeds in general, and the allegations of the bill. It is admitted that a bill of this kind is a perfect novelty. It is in the nature of the office of a trustee, whether expressed in the instrument or not, that the trust property shall reimburse him all the charges and expenses incurred in the execution of the trust. That is implied in every such deed. But it would be strange from that implication to conclude that the persons employed by them are therefore creditors of the trust fund. I doubt very much, and desire not to be understood to admit, that, even if the trustees are charged not to be solvent, those

¹ A portion of the arguments and opinion relating to a question of pleading is omitted. — ED.

persons may come upon the fund. They can have no better right upon the expression of what would, if not expressed, be implied. But particular cases may be exceptions. Try this in bankruptcy. The petitioning creditor is answerable till the assignment. Can there be a doubt that the assignees, if there was nothing special in the deed, would have a clear right to pay all the expense incurred? It would be implied, if not expressed. But can it be said that therefore not the solicitor only, but every person with whom the trustees had incurred a just and fair demand, might sue the trustees, and come for an account of the whole administration? That would be quite mischievous.

This plaintiff had been employed to take out a commission of bankruptcy against the surviving partner. To the whole extent he had proceeded, Stephens was and remained his debtor personally at the time this project was thought of. He remained so after the meeting for the purpose of this trust deed. If the trustees had shown that they had paid Stephens in respect of that commission of bankruptcy, it would be impossible for this plaintiff to have a demand against them. The proposal to supersede the commission, and that a trust deed should be executed, providing for the expenses of preparing the deed, and that all the costs and charges should be reimbursed, succeeded. Suppose a bill had been filed recently after the transaction, and the proceedings and trust deed not paid for: the plaintiff, no party to the deed, and having clearly had the personal liability of Stephens and the trustees as to the commission, and the personal liability of the trustees for preparing the deed, if they accepted it. It was not the meaning of the deed that he should have a right to sue in this way. It was his duty to inform them of the inconvenience of giving a right to sue in this way; for, as it has been observed, this would not stop with the solicitor, for many other persons might be employed in the execution of the trust.

*The demurrer was allowed.*¹

¹ Hall v. Laver, 1 Hare, 571, *accord*.

In Hall v. Laver, *supra*, Sir J. Wigram, V. C., said, p. 577: "The case therefore resolves itself into a question of law, namely, whether if a trustee, or one of several *cestui que trusts*, employs a solicitor to act in the matters of the trust, that retainer gives the solicitor a right of action against each of the other *cestui que trusts*, or a lien upon their shares of the trust estate, for his costs incurred in relation to the trust. That the above circumstances give no right of action against any but the retaining party is clear. That the same circumstances give no lien upon a trust fund, not administered in court, is more than proved by the case of Worrall v. Harford, 8 Ves. 4, in which it was clearly laid down, by Lord Eldon, that a solicitor employed by a trustee has no lien upon the trust fund for his costs, although the trustee paying those costs might himself retain them out of the fund."

See also to the same effect Jones v. Dawson, 19 Ala. 672; Lyon v. Hays, 30 Ala. 430; Mulhall v. Williams, 32 Ala. 489; Wade v. Pope, 44 Ala. 690 (overruling Coopwood v. Lawrence, 12 Ala. 790); Steele v. Steele, 64 Ala. 438.

EX PARTE GARLAND.

IN CHANCERY, BEFORE LORD ELDON, C., AUGUST 17, 1803; MARCH 27,
AUGUST 13, 1804.

[*Reported in 10 Vesey, 110.*]

HENRY BALLMAN, by his will, dated the 17th of February, 1798, after directing his debts, &c., to be paid, bequeathed all his leasehold and personal estates to his wife Margaret Ballman, and three other persons, their respective executors, &c., upon trust to permit Margaret Ballman to receive the rents, interest, &c., for her life, or until she should marry again, for her own use, and the support, maintenance, and education of his five children, until they should respectively attain the age of twenty-one, subject to certain payments to his children, as after mentioned; and from and after the death and second marriage of his wife in trust for all and every or such one or more of his said children or their issue, and in such shares, manner, and form as she should appoint by any deed or instrument in writing or by her will; and for want of such appointment, and as to such parts, of which no such appointment should be made, in trust for all his children, their respective executors, &c., equally to be assigned, paid, and transferred, at their respective ages of twenty-one, with survivorship in case of the death of any under that age; and in case of the deaths of all under that age without leaving issue, then to pay, &c., his said personal estate to Margaret Ballman, her executors, &c.

In Georgia and Texas, if a trustee who has incurred a debt for the benefit of the trust property is insolvent, the creditor is allowed to come upon the trust estate for satisfaction of his claim. *Habersham v. Huguenin*, R. M. Charl. 376; *Wylly v. Colpins*, 9 Ga. 223; *Gaudy v. Babbitt*, 56 Ga. 640 (*semble*); *Malone v. Buice*, 60 Ga. 152; *Robert v. Tift*, 60 Ga. 566; *Kuperman v. McGehee*, 63 Ga. 250; *Owens v. Mitchell*, 38 Tex. 588.

These cases were founded upon some early decisions in South Carolina to the same effect, viz.: *Cater v. Everleigh*, 4 Dess. 19; *James v. Mayrant*, 4 Dess. 591; *Montgomery v. Everleigh*, 1 McC. Ch. 267; *Douglas v. Frazer*, 2 McC. Ch. 105. But by the recent decisions in the latter State the right of the creditor to payment out of the trust estate is restricted to those cases in which the trustee is not in arrear to the trust estate. *Guerrey v. Capers*, Bail. Eq. 159, 162; *Manigault v. Deas*, Bail. Eq. 283, 290; *Henshaw v. Freer*, Bail. Eq. 311, 317, 318; *Magwood v. Johnson*, 1 Hill, Ch. 224; *Tennant v. Stoney*, 1 Rich. Eq. 222, 263; *Adams v. Mackey*, 6 Rich. Eq. 75 (*semble*).

In Mississippi, also, the right of the creditor is subject to the same restriction. *Clopton v. Gholson*, 53 Miss. 466; *Norton v. Phelps*, 54 Miss. 467.

See 15 Am. L. Rev. 449, for a discussion of the question involved in the cases cited in this note. — ED.

The testator then directed his trustees to pay to his children respectively, as they should attain twenty-one, £400 apiece out of his personal estate: and he further directed that his trade of a miller and the farming business, then carried on by him, should be carried on by Margaret Ballman, until his trustees should think proper to establish his sons or either of them therein; and he directed his trustees upon so settling his sons or either of them in the business to permit them to take off the stock, crop, and other effects in the said business at a fair valuation, and to take a bond or note from them for the amount, payable by such instalments as his trustees should think reasonable, with interest in the mean time at four per cent. He also directed that, as long as the business should be carried on by his wife, the profits thereof should be applied for her own use and for the maintenance and education of his children; and that an inventory and valuation of his stock, crop, and effects, in his said businesses, should be taken within six weeks after his decease; and that any sum or sums, not exceeding £300, which by a codicil he increased to £600, should be paid by his trustees to Margaret Ballman out of his personal estate for the purpose of enabling her to carry on the said businesses; and that she should give notes of hand to the other trustees for the sums so advanced to her and the amount of the valuation. He appointed his widow and the other trustees his executors.

After the death of the testator Margaret Ballman carried on the trades till December, 1801, when she became a bankrupt. The other trustees had, according to the directions of the will, advanced her the sum of £600; and the stock and effects were valued at £1,351 5s.; for which she gave two notes to the other trustees. At the time of her bankruptcy she was indebted to the trustees in respect of those two notes, and also in £768 12s. 4d. of the testator's assets, received by her. The surviving trustee proved under the commission the three sums of £1,351 5s., £600, and £768 12s. 4d.

The petition was presented by the assignees under the commission, praying that the proof may be expunged, and the dividends refunded; and that it may be declared that the whole of the personal estate of the testator is liable to all the debts contracted by the bankrupt in carrying on the trades of a miller and farmer under the directions of the will.

When the petition was first heard, two points were made for the assignees: 1st, that the surviving trustee, as a creditor on the notes, ought to be postponed to all the other creditors of the bankrupt; 2dly, that the general assets of the testator were subject to the bankruptcy.

On the first point, the LORD CHANCELLOR [ELDON] immediately expressed a clear opinion in favor of the assignees. The second his

Lordship considered a point of great importance ; and directed a farther argument.

Mr. Alexander and *Mr. Daniell*, in support of the petition. There is no doubt that a trader, entitled to a share of profits, is liable to all the debts. If an executor is directed to carry on the trade, and does so, he must make himself personally liable to the whole of the debts contracted in that trade. *Hankey v. Hammock*.¹ He must have the right of resorting for his indemnity to the whole personal estate, given to him with a direction to carry on the trade. It follows that the creditors must have it, at least by circuitry, to the same extent. Upon that ground in bankruptcy arrangements have been made between different classes of creditors ; viz. between joint and separate creditors ; for they have no lien except by the effect of an action and execution. Those arrangements are founded entirely upon the equities of the partners between each other. But, if the estate is not liable, the consequence is the executor is liable, but as having made the contract. The very profits of the trade may escape from the creditors ; and yet those profits constitute part of the testator's estate. What is the distinction between those profits and any other part of the estate ? There is certainly difficulty in many cases, in the general administration of assets, where the testator directs the trade to be carried on for the benefit of his estate. But that is the necessary consequence of what the testator has thought fit to do, and cannot be a reason for exonerating his estate from that liability which the law would impose upon him. The difficulty is introduced by himself, and it is not inconvenient in practice. If no part except what is by his direction employed in the trade would be liable, the executor must undertake all the personal liability that follows from carrying on the trade, without an opportunity of resorting to the other assets, which upon that supposition may be safely administered. Perhaps executors may shrink from that responsibility, if they have no indemnity ; and that would be the inconvenience of a determination in that way. But, suppose the proposition determined the other way, the executor may, if he thinks fit, administer the assets, and pay the legacies, taking the personal responsibility upon himself, as any other executor may, and the inconvenience would not be greater.

A species of partnership, known upon the Continent, and in writers

¹ At the Rolls, 1786 ; 1 Cooke's Bank. Law, 67, 8th ed. by Mr. Roots, cited as *Hankey v. Hammond*. The Lord Chancellor cited this case from his manuscript note ; by which it appeared that Lord Kenyon gave very special directions for inquiries as to the general debts of the testator, the stock as it stood at his death, and the stock which had been acquired by the widow, what debts he had in the trade, and otherwise, and what debts had been contracted in the trade since his death ; and to distinguish the general personal estate. *Ex parte Richardson*, 3 Mad. 138 ; Buck, 202. In the note, 3 Mad. 148, *Hankey v. Hammock* is stated from the Register's Book.

upon the French law, by the term “En Commandite,”¹ viz. a party bringing in a share, and entitled and liable only in respect of that share, certainly does not prevail here.² The general opinion, that by the law of England there cannot be a partial liability in respect of a particular fund, is strong against the rule, upon which the opposition to this petition must rest. No authority is to be found except that before Lord Kenyon. The effect of this will is a general bequest of all the personal estate to trustees; not a specific legacy to the widow only, with a direction to carry on the trade. The purposes for which the trade is to be carried on are general purposes, of the same nature as those to which all the personal estate is destined by the former part of the will, viz. the maintenance of the widow and children, &c.; consequently there is no separation of this trade for any one particular purpose or person.

Mr. Richards and *Mr. Toller*, for the surviving trustee under the will. Under the circumstances of this case the testator's general assets are not involved in this bankruptcy. Admitting that no case precisely analogous is to be found, upon principle the assignees cannot substantiate a claim to the general mass of the testator's property. Some propositions are perfectly clear; on the one hand, that if an executor under the authority of the will carries on trade with the testator's general assets, not only such general assets, but even his own private property, will be subject to his bankruptcy. It is impossible, therefore, for a man to carry on trade under more disadvantageous terms than an executor in the case supposed. If the trade be beneficial, the profits are applicable to the purposes of the will, and the executor derives no personal benefit from the success of the trade. If, on the contrary, the trade prove a losing concern, the executor, on the failure of the assets, will be personally liable for the loss.

On the other hand, if an executor, without any authority under the will, takes upon himself to trade with the assets, the testator's estate would not be liable in case of his bankruptcy. The parties beneficially entitled under the will would have a right to prove demands for such of the assets as have been wasted by the executor in the trade so carried on in proportion to their respective interests; and with respect to such of the assets as could be specifically distinguished to be part of the testator's estate, they would not pass by the assignment of the commissioners; the executor holding them *alieno jure*, they would clearly not be liable to his bankruptcy.

From both these cases the principle may be extracted on which this

¹ Société de deux Marchands, dont l'un donne son argent, & l'autre ses soins.—Dictionnaire de l'Académie Française.

² In Ireland, by act of Parliament, only that part of a trader's property that is registered is liable.

case may be decided ; that the executor's right to trade with the assets, and their consequent liability to the effect of the bankruptcy, depend altogether upon the nature and extent of the authority conferred upon him by the will. If he has unlimited power to carry on the trade with the testator's property, the whole of it must be involved in the consequences of his bankruptcy. As it would be benefited by the success of the trade, it must be liable to all losses that happen in the course of it. On the other hand, if the executor, not authorized by the will to trade at all in such his representative character, do trade with the assets, he is guilty of a breach of trust ; and the creditors and legatees shall come in under his commission ; and such of his assets as remain shall be protected for their benefit.

In order, therefore, to determine whether the general assets in this case ought to be subject to Mrs. Ballman's bankruptcy, it will be necessary to see the extent of the authority given to her by the will to trade with the assets ; for a testator certainly may qualify the power of his executor to carry on trade, and may limit it to a specific part of his property, which he may sever from the general mass for that purpose.

If a testator disposes of the whole of his property by his will, except, for example, the sum of £5,000, and directs the executor to carry on the trade for the benefit of J. S., there would be no pretence that the assets could in any degree be in danger beyond that extent by the executor's so carrying on the trade ; and in the event of his bankruptcy the rest of his property would not be affected by the commission ; otherwise nothing could be more inconvenient than the consequences of such a doctrine. Suppose the bankruptcy of the executor to occur after the fund has been distributed and all the legacies paid, are the legacies to be refunded ? Is the whole property to be called back ? Are the legatees to be harassed with suits, when perhaps all their legacies have been long ago spent ? Or, in case of such a will, is payment of the legacies to be suspended, and the distribution of the property to be deferred ; and if so, for what period ; and what is to be the limitation ? Such are the difficulties which must arise from holding that, where the testator has separated part of his estate from the general mass of his property, for the purpose of his executor's trading with it, the whole of his property shall be considered as embarked in the event of the trade.

It therefore seems a safer and more convenient rule, as well as more equitable, that the criterion should be, how far the authority given by the will to carry on the trade, extends ; and to what part of the assets his power is referable. So far and no farther shall the assets be held liable to the hazard of such trading. This principle cannot be considered as any infringement of the rights of creditors, or as unduly narrowing their security. If persons trading with the executor know him

to be an executor, and acting in a representative capacity, they ought to look at the will, to see how far his rights extend, and what is the nature of the authority conferred upon him by the testator. If they trade with him without knowing him to be an executor, and conceive themselves to be concerned with him in his own right, they have no reason to complain, his private property being subject to their claims. Therefore it is reasonable that the liability of the testator's assets to the consequences of the executor's trading shall be regulated by the nature of the authority created by the will. If that extends over all the assets, all the assets shall be subject; if over part of the assets, then only such part.

Upon the construction of this will and codicil the testator intended to separate £600 from the rest of his property, with the view that the trade should be carried on by the widow, and that sum only was to be hazarded, the general mass of the property would not have been in any degree benefited, if the trade had been successful. Mrs. Ballman had a right to apply the profits at her discretion, provided she took care of the maintenance and education of the children.

Mr. Alexander, in reply. Suppose a trade, directed to be carried on by the executor until one of the younger sons of the testator shall attain twenty-one, and then to be delivered up to that son, and that £50,000 is given by the will to that son, can it be contended that upon the principle now urged the trade is to be carried on, and yet the executor, incurring all that risk, is not to have recourse to that fund, part of the assets in his hands, and accumulating for the benefit of that legatee, the executor acting in that character by the direction of the testator, not with the consent of the infant? If a specific contract was directed to be carried into execution, and a liability was thereby incurred, could not the executor have recourse to the assets for an indemnity? The only distinction is, that a trade consists of a variety of contracts, instead of a specific one.

The LORD CHANCELLOR [ELDON]. In the case before Lord Kenyon the important difficulties that have been urged upon this occasion were not submitted to the court. Certainly Lord Kenyon developed the reasons upon which he drew the conclusion in that case in a very limited degree, if at all. The question really goes to this, whether this court is to hold that where a testator directs a trade to be carried on, and without limitation, all the other purposes of his will are to stand still, or all the administration under it to be checked, that every person taking is in effect to become a security in proportion to the property he takes, and to the extent of all time, for the trade which the testator has directed to be carried on. The inconvenience would be intolerable, amounting to this, that every legatee is to hold his legacy upon terms connected with transactions by which he cannot benefit, which he can-

not control, and which may cut down all his hopes, as far as they are founded upon his receipt of that bounty. On the other hand, the case of the executor is very hard. He becomes liable, as personally responsible, to the extent of all his own property, also in his person, and as he may be proceeded against as a bankrupt, though he is but a trustee. But he places himself in that situation by his own choice, judging for himself whether it is fit and safe to enter into that situation and contract that sort of responsibility. The creditors of the testator must be either those whose debts were contracted before his death, or persons who have become creditors of the trade after his death. If they are creditors of the former description, they have the power and the means of calling forth after the testator's death the whole of his property, in discharge of their demands; and if they do not put an end to that relation, but permit the representative to act, they have perhaps no more reason to complain of a decision, more limited than that of Lord Kenyon, than they would have, if by their own conduct they permitted part of the assets to get to the hands of persons from whom they could not draw them, and relied upon his liability.

As to creditors subsequent to the death of the testator, in the first place, they may determine whether they will be creditors. Next, it is admitted they have the whole fund that is embarked in the trade; and in addition they have the personal responsibility of the individual with whom they deal, the only security in ordinary transactions of debtor and creditor. They have something very like a lien upon the estate embarked in the trade. They have not a lien upon anything else; nor have creditors in other cases a lien upon the effects of the person with whom they deal; though through the equity, as to the application of the joint and separate estates to the joint and separate debts respectively, they work out that lien. If it is to be determined upon the convenience, it is not so inconvenient to say, those who deal with the executor must take notice that the testator's responsibility is limited by the authority given to the executor, as to say, on the other hand, that the executor being authorized to carry on that trade, making from day to day a great variety of engagements, or, as it has been put, entering into one great and important engagement, but also authorized by the will to do many other acts, which he must equally do in a due administration under the will, wherever for the benefit of one child the trade is directed to be carried on, all the other objects of the will must at any distance of time be considered, to the extent of the property they take, security for the creditors on the trade.

Such a decision was never made prior to *Hankey v. Hammock*. I am not aware that such a decision has ever been made since that case. We may recollect cases not consistent with the supposition that the law is according to that decision. It is necessary to look into other cases,

from which it may appear that it was not present to the mind of the court that there was such a rule. The difficulty also that must exist in a variety of instances is to be considered, — the case that has been put, where a tradesman directs the trade to be carried on for the benefit of a son, giving him a legacy of £50,000. It is difficult to say that legacy must not be liable; and yet it is very difficult to say it shall be liable, consistently with saying legacies to others shall not; unless upon this, that the legacy is given by the same will, for the benefit of the same person, who is to have the benefit of the trade; and yet I do not know that is a principle of distinction by which I can abide. But, in the ordinary case, the eldest son, made residuary legatee and executor, and ordered to carry on the trade for the benefit of another child, cannot possibly withdraw his residuary legacy from the liability the trade carried on would impose upon him personally, for he makes himself personally liable; and therefore with reference to the property taken from his father, though not liable as legatee, he becomes liable as a person carrying on the trade, — his legacy assisting the means of his responsibility in carrying on the trade. That person, therefore, both legatee and executor, must answer for his acts as to the trade. Then why should not another legatee? The answer is, that person is liable, not as legatee, but upon the ground that the property is part of his general substance, and he may spend it, notwithstanding his liability as executor. So may another legatee; but the power of spending his general substance shows there is no great convenience in this doctrine.

In this case, I fear I shall be under the necessity of contradicting the authority of a judge I most highly respect, feeling a strong opinion that only the property declared to be embarked in the trade shall be answerable to the creditors of the trade.¹ If I am not bound by decision, the convenience of mankind requires me to hold that the creditors of the trade, as such, have not a claim against the distributed assets in the hands of third persons under the direction of the same will, which

¹ *Ex parte* Richardson, 3 Mad. 138; *Thompson v. Andrews*, 1 M. & K. 116; *Cutbush v. Cutbush*, 1 Beav. 184; *Ex parte* Butterfield, De Gex, 570 (*semble*); *McNeillie v. Acton*, 4 D., M. & G. 744; *Ex parte* Westcott, L. R. 9 Ch. Ap. 626 (*semble*); *Owen v. Delamere*, L. R. 15 Eq. 134 (*semble*); *Fairland v. Percy*, L. R. 3 P. & D. 217; *Scholefield v. Eichelberger*, 7 Pet. 586 (*semble*); *Burwell v. Cawood*, 2 How. 560; *Smith v. Ayer*, 101 U. S. 320; *Jones v. Walker*, 103 U. S. 444; *Cook v. Administrator*, 3 Fed. Rep. 69; *Edgar v. Cook*, 4 Ala. 588; *Pitkin v. Pitkin*, 7 Conn. 307; *Blodgett v. American Bank (Conn.)*, 14 Chic. L. N. 112; *Stanwood v. Owen*, 14 Gray, 195; *Lucht v. Behrens*, 28 Ohio St. 231; *Gratz v. Bayard*, 11 S. & R. 41 (*semble*); *Laughlin v. Lorenz*, 48 Pa. 275; *Davis v. Christian*, 15 Grat. 11, *accord*.

The remedy against the trustee must be exhausted before a creditor can come upon the trust property. *Owen v. Delamere*, *supra*; *Fairland v. Percy*, *supra*. — Ed.

has authorized the trade to be carried on for the benefit of other persons.

August 13th. The LORD CHANCELLOR [ELDON]. My opinion upon this case is, that it is impossible to hold that the trade is to be carried on perhaps for a century, and at the end of that time the creditors dealing with that trade are, merely because it is directed by the will to be carried on, to pursue the general assets, distributed perhaps to fifty families.

The order was, that the proof should stand in respect of the sum of £768 12s. 4d., without prejudice to filing a bill.

No bill was filed.

FENWICK v. WILLIAM LAYCOCK.

IN THE QUEEN'S BENCH, JUNE 19, 1841.

[Reported in 2 Queen's Bench Reports, 108.]

C. C. JONES, in this term, obtained a rule calling on the plaintiff and the defendant W. Laycock “(trustee for Frederick Charles Miller and Henry John Miller)” to appear before this court, and state the nature and particulars of their respective claims to the goods and chattels seized by the Sheriff of Middlesex under a *fi. fa.*, and maintain or else relinquish the same, and show cause why the court should not make such rule as the court should think fit, pursuant to the statute, &c.

The rule was obtained on behalf of the sheriff. It appeared that, after the seizure, the sheriff's officer received a notice from the defendant that the goods were not defendant's property, but were held by him as a trustee, under the will of the late Amelia Miller, for her children, Frederick John Miller and Henry John Miller, under which will the defendant claimed the goods as trustee; and that if the sheriff removed or sold, he would do so at his peril. In this term,¹

Whitehurst was heard for the execution creditor, *Miller*, for the defendant, and *C. C. Jones*, for the sheriff. The course of the argument will sufficiently appear by the judgment. Besides the cases there mentioned, the following were cited: *Putney v. Tring*,² *Sturgess v. Claude*,³ *Izod v. Lamb*,⁴ *Quick v. Staines*.⁵ *Cur. adv. vult.*

LORD DENMAN, C. J., now delivered the judgment of the court.

This was a sheriff's interpleader rule, under Stat. 1 & 2 Wm. IV. c. 58. And the question raised was, whether the defendant or the

¹ June 12th, before Lord Denman, C. J., Patteson, Williams, and Coleridge, JJ.

² 5 M. & W. 425.

³ 1 Dowl. P. C. 505.

⁴ 1 C. & J. 35.

⁵ 1 B. & P. 293.

execution creditor was, under the circumstances, entitled to be the claimant, and whether, such claim having been made, the sheriff could come to this court for relief.

The ground on which the defendant resists the seizure by the sheriff is, that the goods on which the levy is made are not his in his own right, but that he holds possession of them as executor of one Amelia Miller, in trust for the payment of her creditors, and the maintenance and education of two of her children until they come of age, when they are to be sold and the proceeds divided between them. The testatrix died in November, 1839; and the defendant has been in possession of part of the goods ever since. These goods consisted of fixtures and trade utensils, with which, and the stock found on the premises at the time of her death, he has carried on the business for the purpose of the trust, replacing the consumed stock by the proceeds of the business, and applying the residue of them as directed by the will. He has no personal interest, except as he pays himself the foreman's wages, which he used to receive in the lifetime of the testatrix. The action is brought against him in his private character, and not as executor.

We apprehend the law upon this subject is tolerably well settled in *Whale v. Booth*,¹ to be found in a note to *Farr v. Newman*,² but fully reported in *Douglas*. It was held that, where the sheriff seized and sold the goods of the testator on an execution for the executor's own debt, the property passed by the sale, although the plaintiff was cognizant of the fact; but there Lord Mansfield said that the executor might have disputed the seizure with the sheriff: and he puts the case, by reason of the executor's consent, on the footing of an alienation by the executor. In *Farr v. Newman*,³ this court, Buller, J., dissenting, held that, where a writ at the suit of the testator's creditor came in before a writ at the suit of the executor's creditor had been executed, the sheriff was bound to levy under the last delivered writ. And in *Gaskell v. Marshall*,⁴ Lord Tenterden ruled that the administrator, who had taken possession of goods of the intestate, and used them for three months in the intestate's house, might, as administrator, maintain trespass against the sheriff for seizing, and, after notice, selling them under a writ for the administrator's own debt. He gave leave to move to enter a nonsuit; but his ruling was not questioned. In that case, it is true, he is reported to have said, "If the plaintiff had been in possession of the goods for a very long time, it might have been otherwise;" and here the possession has been long: but then it is a possession consistent with the will, and necessary to the execution of the trust reposed. It

¹ 4 Doug. 36; s. c., note (a) to *Farr v. Newman*, 4 T. R. 625.

² 4 T. R. 621.

³ 4 T. R. 621.

⁴ 1 Moo. & Rob. 132; s. c. 5 C. & P. 31.

seems, therefore, clear that this case is within the mischief contemplated by the act of 1 & 2 Wm. IV. c. 58; and that, as to a large portion at least, if not all, of the articles seized, the sheriff will be liable to be sued by the defendant if the execution is persisted in.¹

*Rule absolute accordingly.*²

WHITWORTH *v.* GAUGAIN.

IN CHANCERY, BEFORE SIR JAMES WIGRAM, V. C., MARCH 25, 26,
27, 28, APRIL 3, 1844.

[*Reported in 3 Hare, 416.*]

VICE-CHANCELLOR.³ The plaintiffs, in this case, are equitable mortgagees of one George Cooke, by a deposit of title-deeds of free-hold estates, accompanied with a memorandum in writing, explaining that the purpose of the deposit was to secure a then existing debt and future advances.

To explain the legal effect of this transaction as between the plaintiffs the mortgagees, and Cooke the mortgagor, I shall content myself with quoting the words of the Lord Chancellor of Ireland, in the case of *Rolleston v. Morton*:⁴ “If a man has power to charge certain lands, and agrees to charge them, in equity he has actually charged them; and a court of equity will execute the charge.” No one, I apprehend, could seriously contend that the memorandum in writing above set forth had not the effect of charging the property as between the mortgagees and the mortgagor. It created as perfect an equitable charge as intention and act can possibly create.

The defendants, between whom and the plaintiffs the contest in the cause exists, are judgment creditors of George Cooke, whose judgments were entered up after the mortgage to the plaintiffs, and who have since, by means of elegits, obtained actual possession of the lands comprised in the mortgage; and the question between them is, which of the two is in equity to be preferred to the other?⁵ In considering that

¹ The remainder of the opinion of the court, in which it was decided that the sheriff was entitled to the rule applied for in this case under St. 1 & 2 Vict. c. 58, § 6, is omitted. — ED.

² Approved in *Re Morgan*, 18 Ch. D. 100. See also *infra*, p. 577, note 1. — ED.

³ See *supra*, 79 n. 1. — ED.

⁴ 1 Dr. & War. 195.

⁵ The bill, which was filed on the 17th of March, 1841, charged that the hereditaments and premises comprised in the said title-deeds (together with a policy of insurance which the plaintiffs also held as a further security) were wholly inadequate to satisfy the sums due to them by virtue of such equitable lien. The bill prayed that an account might be taken of what was due to the plaintiffs in respect of their equitable lien upon the said deeds and writings, and that they might be declared to have an

question I shall here repeat what I have on more than one occasion already said respecting Lord Cottenham's judgment when this cause was before him upon motion, namely, that I am satisfied he did not intend, by what he said, finally to decide the point now before me. However strong the leaning of his mind may have been in favor of the judgment creditor, he not only did not intend to decide it, but intended that it should be reserved. And I, therefore, consider myself not only at liberty, but bound, to decide the cause according to my own understanding of the law.

Now, if the question be not decided by that judgment, I have certainly a very strong opinion upon it. The more I consider the case, the more satisfied I feel that I stated the general principle correctly in *Langton v. Horton* when I said that a creditor might, under his judgment, take in execution all that belonged to his debtor, and nothing more. He stands in the place of his debtor. He only takes the property of his debtor, subject to every liability under which the debtor himself held it. First, take the case of an ordinary trust. It could not for a moment be contended that this court would not protect the interest of the *cestui que trust* against the judgment creditor of the trustee.¹ The judgment of Lord Cottenham in *Newlands v. Paynter*²

equitable mortgage upon the hereditaments and premises, and to be entitled to priority over the said elegits and judgments of Mayor and Pelle; that the hereditaments and premises included in the plaintiffs' said equitable mortgage (and the said policy) might be sold; and out of the proceeds of such sales the said debt and costs of the plaintiffs might be paid; and, if the same should be insufficient, that the plaintiffs might be admitted to prove for the deficiency against the estate of Cooke, in the bankruptcy. The bill also prayed the appointment of a receiver, and for an injunction. — Ed.

¹ *Medley v. Martin*, Finch, 63; *Newlands v. Paynter*, 4 M. & C. 408; *Re Morgan*, 18 Ch. D. 93; *Roberts v. Death* (Q. B. D.), 30 W. R. 76; *Gill v. Continental Co.*, L. R. 7 Ex. 322; *McAuley v. Clarendon*, 8 Ir. Ch. 121; *Wanzer v. Truly*, 17 How. 584; *Booker v. Carlile*, 14 Bush, 154; *Rogers v. Hendsley*, 2 La. 597; *Huntt v. Townshend*, 31 Md. 336; *Hancock v. Titus*, 39 Miss. 224; *Callaway v. Johnson*, 51 Mo. 33; *Campfield v. Johnson*, 1 Halst. Ch. 245; *Lounsbury v. Purdy*, 11 Barb. 490; *Drysdale's Appeal*, 15 Pa. 457 (*semble*); *Thomas v. Walker*, 6 Hum. 93; *Click v. Click*, 1 Heisk. 607; *Gass v. Gass*, 1 Heisk. 613; *Sandford v. Weeden*, 2 Heisk. 71; *Baker v. Hardin*, 10 Heisk. 300, *accord*.

The assets of a testator cannot be taken even at law in satisfaction of a judgment against the executor. *Farr v. Newman*, 4 T. R. 621; *McLeod v. Drummond*, 17 Ves. 152, 168, per Lord Eldon; *Kinderley v. Jervis*, 22 Beav. 1, 23; *Gaskell v. Marshall*, 1 M. & Rob. 132; *Williams v. Fullerton*, 20 Vt. 346. See *Whale v. Booth*, 4 Doug. 36.

There are decisions also that a creditor of a trustee cannot even at law reach the property of the *cestui que trust*. *Smith v. McCann*, 24 How. 398; *Baker v. Copenbarger*, 15 Ill. 103; *Elliott v. Armstrong*, 2 Blackf. 198 (*semble*); *Houston v. Nowland*, 7 Gill & J. 480; *Bancroft v. Consen*, 13 All. 50 (*semble*); *Ashurst v. Given*, 5 Watts & S. 323; *Wilhelm v. Fulmer*, 6 Barr, 296; *Shryock v. Waggoner*, 28 Pa. 430; *Hackett v. Calender*, 32 Vt. 97; *Hart v. Farmers' Bank*, 33 Vt. 252; *Abell v. Howe*, 43 Vt. 403.

² 4 Myl. & Cr. 408.

is decisive upon that point, and the other cases cited at the bar prove the same thing. Secondly, take the case of a purchaser for value before conveyance. *Lodge v. Lyseley*¹ is an authority, if authority could be wanting, to show that the equitable interest of such a party will be preferred in equity to the claim of the judgment creditor of the vendor.² Again, take the case of an equitable charge to pay debts, or legacies, or any other equitable interest, except that of an equitable mortgagee, and I apprehend the right of the equitable incumbrancer to be preferred to the judgment creditor of the debtor, in whom the legal estate in the property charged might be, will be, as indeed it properly was, admitted. And if such equitable interests are thus protected, upon what principle is the equitable mortgagee to be excluded from the like protection? Unless I misunderstand the report of the case of *Williams v. Craddock*,³ the counsel, as well as the court, were of opinion, that an interest by way of equitable mortgage was entitled in this court to the same protection against judgments as other equitable claimants.

In the argument of this case both parties referred to, and drew conclusions from, the proposition, that in a court of equity a purchaser for value, who obtains a conveyance of the legal interest without notice of an equity affecting the specific subject of his purchase, will in equity, as at law, have a better title to that subject than the mere equitable claimant. The proposition thus admitted, and necessarily admitted, by both parties, is pregnant with consequences which go a great way towards deciding the question now before me. If the tenant by elegit is (as was argued) to be considered as a purchaser for value without notice under a conveyance, all trusts, and all equitable interests of every description, must be subject to the judgments against the trustee. For a purchaser for value, without notice from a fraudulent trustee, having got the legal estate, will unquestionably be preferred in equity to the *cestui que trust*; and it appears to me to be impossible, except by a merely arbitrary decision, to distinguish the case of an ordinary trust or other equitable interest from the present, in considering merely the effect of a judgment upon it, unless it can be shown that the interest of the equitable mortgagee is, for the present purpose, distinguishable from that of an ordinary *cestui que trust*. Again, it follows, conversely,

See also *Warren v. Ireland*, 29 Me. 62; *Chickering v. Lovejoy*, 13 Mass. 51; *Haynes v. Jones*, 5 Met. 292.

A trustee cannot claim a homestead right in trust property. *Shepherd v. White*, 11 Tex. 346. See also *Re Whitehead*, 2 N. B. R. 599.

The creditor of a feoffee to uses might satisfy his judgment out of the property held in use. Y. B. 14 Hen. VIII. f. 4, pl. 5; *supra*, p. 530. — ED.

¹ 4 Sim. 70.

² *Finch v. Earl of Winchelsea*, 1 P. Wms. 277 (*semble*); *Prior v. Penpraze*, 4 Price, 99; *Lodge v. Lyseley*, 4 Sim. 70; *Houston v. Nowland*, 7 Gill & J. 480; *Manley v. Hunt*, 1 Ohio, 121, *accord.* — ED.

³ 4 Sim. 316.

that if the equitable interest of an ordinary *cestui que trust*, or any other equitable interest, is not subject to judgments against the trustee, though executed, then those judgments, though executed, are not analogous to purchases for value. In other words, the judgment creditor of a trustee is not a purchaser for value in the contemplation of a court of equity. The proposition, that a judgment creditor is a purchaser for value, would prove too much for the defendants' purpose. It would affect all equitable interests alike.

But it was said that the interest of an equitable mortgagee was distinguishable from that of an ordinary *cestui que trust*, and other equitable interests (charges, for example, to pay debts and legacies paramount the title of the debtor), which it was admitted would be preferred in equity, — that the interest of the equitable mortgagee was imperfect, — that of the *cestui que trust* perfect. In what respect is the interest of the equitable mortgagee imperfect? As between the mortgagor and mortgagee it is absolute and complete. In what respect is it imperfect as between the mortgagee and those who claim under the mortgagee, as his creditors by judgment? The interest of the equitable mortgagee is liable to be defeated by a fraudulent dealing with the legal estate, and in that respect, no doubt, it is imperfect. But that is an infirmity to which all equitable interests are subject; and if other equitable interests are to be protected against judgments obtained against the trustee, or other party in whom the legal estate may be, why is the interest of the equitable mortgagee to be unprotected? The debt was no more contracted upon the view of the land (if that were material, which I think it is not) in the one case than in the other.

The most plausible way of stating the case in favor of the judgment creditor is by supposing his right to be founded in contract, and not to be the result of a proceeding *in invitum*; and this, no doubt, may be the truth of the case, when the judgment is voluntarily confessed; and I paid the greatest attention to the arguments of counsel upon that point. But, admitting that view to be correct, how does it alter the case? The question remains, — what was the contract? It was a general contract for a judgment, and the fruits of a judgment; and the original question, therefore, — what right does a judgment confer? — remains wholly untouched by the concession. If a party contracts specifically for a given property, pays the purchase-money, and obtains the legal title, without notice up to the time of obtaining the conveyance, as well as of paying his money, that may give him a right to be preferred to an equitable claim which is prior in point of time. But there is no principle upon which a court of justice can be required to imply that a general contract to give a judgment is a contract to give that which does not belong to the debtor. If the trustee were to confess a judgment, am I to imply that it amounts to a specific contract

to give the creditor an interest in that which belongs to the *cestui que trust*? That appears to me to be the true distinction. In one case the party contracts for a specific thing, — in the other he merely takes a judgment, that gives him nothing more than a right to that which belongs to his debtor.

The above propositions, which, separately taken, I believe to be unimpeachable, will be found to meet every argument that was addressed to me in support of the defendants' case, independently of the late statutes.

I am clear that the late statutes make no difference in the case. So far as the judgment creditor claims to be a mortgagee, in writing, under the statute, he is posterior, in point of time, to the plaintiffs. But it was said that the equity of the judgment-creditor was equal to that of the equitable mortgagee, and that he has, by the force of the *elegit* executed, an estate at law in addition to his equitable interest, and therefore is to be preferred. I need not, after what I have already said, proceed to expose the fallacy of this argument; it takes for granted the whole question in dispute. That the tenant by *elegit* has an estate in that which he may lawfully take (that which belongs to his debtor), I do not deny; but to say that by force of the *elegit* he acquires a rightful interest in this court, in that which in equity does not belong to his debtor, is taking the whole matter in contest for granted, the whole question being what he may take.

I can only repeat that it appears to me impossible, except upon the most arbitrary distinction, to say that the interests of an equitable mortgagee are not to be protected, and yet that protection is to be afforded to the interests of an ordinary *cestui que trust* and other equitable interests. I do not go into the reasoning of the cases which have been cited; all of them, however, appear to me to support the view I have taken. If my judgment cannot be supported upon propositions which are indisputable in themselves, — whether properly applicable to the case or not, — no explanation I can give of the cases will at all strengthen the foundation of that judgment. I must hold that the plaintiffs have a right to the payment of their debt out of the estate comprised in the deed. If there is any difficulty in the details of the decree, the case may be mentioned again.¹

¹ Affirmed by Lord Cottenham, 1 Phill. 728, who said, p. 733: "In the argument on the part of the defendant, the case was put upon the footing of a purchaser for value without notice, who would be preferred to a prior equitable mortgagee. But a distinction in this respect has always been made between a judgment obtained without notice of a previous charge, and a purchase or mortgage. In the case already mentioned of *Burgh v. Francis*, judgments had been obtained, but they were not allowed to prevail against the plaintiff's equity. 'A purchaser without notice of the trust,' Lord Nottingham observed, 'may be free, but an incumbrance' (speaking of the judgments) 'is not like a sale.' The learned author of the *Forum Romanum* expresses himself to the same

IN RE JOHNSON. SHEARMAN v. JOHNSON.

IN THE HIGH COURT OF JUSTICE, CHANCERY DIVISION, JULY 19, 1880.

[Reported in 15 Chancery Division, 548.]

ADJOURNED SUMMONS. Peter Johnson, by his will, dated the 27th of May, 1873, appointed the defendant Robinson and another his executors; and, after making certain specific and pecuniary bequests, and directing the payment of his debts, and funeral and testamentary expenses, he directed his executors, as soon as might be after his decease, to collect, get in, and receive all debts owing to him in respect of the business of a tailor and robe-maker then carried on by him at Cambridge, and also all other debts owing to him not connected with the business then carried on by him in London in partnership with Thomas Sadler, and (subject to the provisions thereafter contained) to sell effect. 'In the case of a judgment creditor,' he says, 'the original security was only personal, and a court of equity will not suffer the person that originally lent upon the security of land to have the security destroyed by one who did not lend upon that security.' This distinction is also taken in the case of *Brace v. The Duchess of Marlborough*, 2 P. Wms. 491; in *Taylor v. Wheeler*, 2 Vern. 564; in *Sir Simeon Stuart's Case*, cited 3 Ves. 576; and in many other cases." See to the same effect *Burgh v. Francis*, 3 Swanst. 536 n. (a); *Finch*, 28, s. c.; *Casberd v. Atty.-Gen.*, 6 Price, 411; *Brearchiff v. Dorrington*, 4 De G. & Sm. 122; *Beavan v. Oxford*, 6 D., M. & G. 507; *Kindersley v. Jervis*, 22 Beav. 1; *Scott v. Hastings*, 4 K. & J. 633; *Eyre v. McDowell*, 9 H. L. 619; *Pickering v. Ilfracombe R. R.*, L. R. 3 C. P. 235; *Abbott v. Stratten*, 3 Jones & Lat. 608; *Dunster v. Glengall*, 3 Ir. Ch. 47; *Pennock v. Coe*, 23 How. 117; *Re Howe*, 1 Paige, 125; *Robinson v. Williams*, 22 N. Y. 380; *Ins. Co. v. Phoenix Co.*, 71 Pa. 31; *Delaire v. Keenan*, 3 Dess. 74.

The case of *Watts v. Porter*, 3 E. & B. 743, *contra*, was declared in *Robinson v. Nesbitt*, L. R. 3 C. P. 264, to be overruled.

On the same principle the mortgagee of property to be hereafter acquired will take precedence of a subsequent execution creditor of the mortgagor. *Langton v. Horton*, 1 Hare, 560; *Holroyd v. Marshall*, 10 H. L. C. 191 (reversing s. c. 2 D., F. & J. 596, and explaining *Mogg v. Baker*, 3 M. & W. 195); *Mitchell v. Winslow*, 2 Story, 630, 644; *Pennock v. Coe*, 23 How. 117 (see also *Butt v. Ellett*, 19 Wall. 544; 1 Woods, 214, s. c.); *Beall v. White*, 94 U. S. 382 (*semble*); *Brett v. Carter*, 2 Low. 458; *Barnard v. Norwich Co.*, 14 N. B. R. 469 (see *Schuelenburg v. Martin*, 2 Fed. Rep. 747); *Robinson v. Mauldin*, 11 Ala. 977; *Floyd v. Morrow*, 26 Ala. 353; *Apperson v. Moore*, 30 Ark. 56 (*semble*); *Gregg v. Sanford*, 24 Ill. 17 (*semble*); *Scharfenburg v. Bishop*, 35 Iowa, 60 (*semble*); *Hamlin v. Jerrard*, 72 Me. 62 (see *Morrill v. Noyes*, 56 Me. 458); *People v. Bristol*, 35 Mich. 28; *Sillers v. Lester*, 48 Miss. 513 (*semble*); *Smithurst v. Edmunds*, 1 McCarter, 408; *Williams v. N. J. Co.*, 29 N. J. Eq. 311, 320 (*semble*); *McCaffrey v. Woodin*, 65 N. Y. 459; *Phila. Co. v. Woelpper*, 64 Pa. 366; *Groton Co. v. Gardiner*, 11 R. I. 626; *Cork v. Corthell*, 11 R. I. 482; *Williams v. Briggs*, 11 R. I. 476; *Williams v. Winsor*, 12 R. I. 9; *Tedford v. Wilson*, 3 Head, 311; *Phelps v. Murray*, 2 Tenn. Ch. 746; *First Bank v. Turnbull*, 32 Grat. 695.

But see *contra*, *Ross v. Wilson*, 7 Bush, 29; *Moody v. Wright*, 13 Met. 17, 30; *Chase v. Denny*, 130 Mass. 566 (*semble*) (but see *Brett v. Carter*, 2 Low. 458); *Chynoweth v. Tenney*, 10 Wis. 397; *Hunter v. Bosworth*, 43 Wis. 583 (*semble*). — Ed.

and convert into money all his Cambridge stock in trade, and stand possessed of the proceeds, and all other his personal estate and effects whatsoever (except his share and interest in the London business) not thereinbefore specifically bequeathed, upon trust to pay one equal fourth part thereof to and amongst such of the children of his deceased sister Catherine Neill (including his nephew John Neill) as should be living at the time of his decease; one other equal fourth part to the plaintiff; and the remaining two fourth parts to the several persons therein named. And the testator declared that in case his nephew John Neill should be under the age of twenty-one years at the time of his decease, it should be lawful for his said executors, upon the request of the said John Neill, to postpone the sale of his Cambridge stock in trade and allow his said business of a tailor and a robe-maker at Cambridge to be carried on by the said John Neill, for his own benefit, under the supervision of his said executors, until such time as the said John Neill should attain twenty-one, and during such period should use such part of the share of the said John Neill in his residuary personal estate as might be requisite for the due carrying on of the said business. And he directed, in case that provision was carried into effect, that an inventory and valuation of all his stock in trade at Cambridge should be taken immediately after his decease, and that on the said John Neill attaining his age of twenty-one years he should have the option of taking the then existing stock at the amount of such valuation, and that if he declined to do so, and the said stock was sold, then the said John Neill should bring the amount of the proceeds of such sale into hotchpot on the calculation for the distribution of the residuary personal estate. The testator then gave certain directions as to the winding up of his partnership in the London business, and directed that his share and interest therein should fall into his residuary personal estate.

The testator died on the 25th of November, 1875, and his will was proved by the defendant Robinson alone, the other executor having renounced. There were living at the testator's death two children of his deceased sister Catherine, one of whom was the said John Neill, then an infant.

After the testator's death the defendant did not get in the book debts of the Cambridge business as directed by the will, but he continued to carry on the business in his own name until the 30th of June, 1878, when John Neill attained twenty-one; he also continued the management of the testator's share in the London business. For the purpose of carrying on the Cambridge business, the defendant advanced from time to time several sums of money out of John Neill's share in the testator's personal estate, which sums were repaid out of the business in the ordinary course of carrying it on, but the defendant kept no separate banking account for the business.

An action having been instituted by one of the residuary legatees, and a judgment obtained for the administration of the testator's estate, it was found, on taking the defendant's accounts, that there was due from him a balance of £764 16s. 1d. in respect of profits from the Cambridge business, and also a balance of £1,668 3s. 1d. in respect of the general personal estate of the testator, including his share in the London business.

Amongst the creditors who made claims against the estate under the judgment were several persons who had supplied the defendant with goods in the course of his carrying on the Cambridge business subsequently to the testator's death; but these claims being disallowed by the chief clerk, summonses were taken out by three of these creditors for the purpose of establishing their claims. One of the summonses was by a firm of Standen & Co., woollen warehousemen, and asked that a sum of £460 5s. 10d. due to them for goods sold and delivered to the defendant, the executor, in the course of his carrying on the trade or business of a tailor from the time of the testator's death down to the 30th of June, 1878, might be forthwith paid to them by the said executor out of the share of the said John Neill in the testator's residuary personal estate; or otherwise that it might be declared that the applicants were entitled to a lien on the portion of the estate of the said testator which on the 30th of June, 1878, was embarked in the carrying on as aforesaid of the said testator's business; and that an inquiry might be directed for the purpose of ascertaining what were the assets of the said testator which were so subject to the lien of the applicants.

The two other summonses, which were by creditors for an aggregate amount of upwards of £600, asked that they might be at liberty to bring in their claims against the assets of the business carried on by the defendant under the powers of the will, in respect of debts incurred by him to the applicants in the course of such business, and that such assets might be applied in payment of what should be found due to the applicants in respect of their debts. Upon the further consideration of the action all three summonses came on for hearing.

It appeared that the defendant, the executor, was insolvent.

Grosvenor Woods, for Messrs. Standen's summons. I submit that the assets of the testator are liable to our debt to the extent of, if not the whole residue, at least one-eighth thereof, that being the portion of assets which the testator directed to be employed in the business. *Ex parte Garland*; *Cutbush v. Cutbush*; ¹ *Owen v. Delamere*; ² *Fairland v. Percy*.³ The principle is that, though the executor is personally liable for debts contracted in carrying on the business pursuant to his testator's directions, he is entitled to indemnity in respect thereof out of the estate of the deceased; consequently the assets directed by the

¹ 1 Beav. 184.

² Law Rep. 15 Eq. 134.

³ Law Rep. 3 P. & M. 217.

testator to be employed in carrying on the business are liable to make good the debts contracted during their employment. Lindley on Partnership; ¹ *Ex parte Edmonds*.² As the business has been carried on for the benefit of Neill, he ought not to take any part of his eighth share without first satisfying our debt.

[Farhall *v.* Farhall³ was also referred to.]

Speed and *Maidlow*, for the other two summonses, took the same view *R. F. Norton*, for Neill, was not called upon.

E. W. Byrne, for the plaintiff.

Seward Bryce and *E. C. Austin*, for other parties.

The defendant did not appear by counsel.

JESSEL, M. R. I shall dismiss these summonses, but I will give the creditors liberty to present a petition. I will not distribute the assets until they have presented a petition: that seems to me the regular course, but at present I do not see that they are entitled to anything. That seems to have been the course taken in several cases, and I think it is the right course, for the creditors are not parties to this suit at all. They ought to come in under a petition. With regard to the point that has been argued, I understand the doctrine to be this, that where a trustee is authorized by a testator, or by a settlor, — for it makes no difference, — to carry on a business with certain funds which he gives to the trustee for that purpose, the creditor who trusts the executor has a right to say, “I had the personal liability of the man I trusted, and I have also a right to be put in his place against the assets; that is, I have a right to the benefit of indemnity or lien which he has against the assets devoted to the purposes of the trade.” The first right is his general right by contract, because he trusted the trustee or executor: he has a personal right to sue him and to get judgment and make him a bankrupt. The second right is a mere corollary to those numerous cases in equity in which persons are allowed to follow trust assets. The trust assets having been devoted to carrying on the trade, it would not be right that the *cestui que trust* should get the benefit of the trade without paying the liabilities; therefore the court says to him, You shall not set up a trustee who may be a man of straw, and make him a bankrupt to avoid the responsibility of the assets for carrying on the trade: the court puts the creditor, so to speak, as I understand it, in the place of the trustee. But if the trustee has wronged the trust estate, that is, if he has taken money out of the assets more than sufficient to pay the debts, and instead of applying them to the payment of the debts has put them into his own pocket, then it appears to me there is no such equity, because the *cestuis que trust* are not taking the benefit. The trustee having pocketed the money, the title of the creditor, so to speak, to be put in the place of the trustee, is a title to get nothing,

¹ 3d ed. p. 1103.

² 4 D., F. & J. 488, 498.

³ Law Rep. 7 Ch. 123.

because nothing is due to the trustee. It does not appear to me that in that case the creditor, who has never contracted for anything, who has only got the benefit of this equity, if I may say so, by means of the trustee, through the lucky accident of there being a trust, ought to be put in a better position than any other creditor. I do not see that any judge has said so.

If we start with *Ex parte* Garland, what Lord Eldon says is this: "It is admitted, they [the creditors] have the whole fund that is embarked in the trade" — that is, as between themselves and the executors the creditors can claim the application of the fund; "and in addition they have the personal responsibility of the individual with whom they deal: the only security in ordinary transactions of debtor and creditor." [His Lordship then read down to the words "security for the creditors on the trade,"¹ and continued:] Then,² after expressing his strong opinion that only the property declared to be embarked in the trade should be answerable to the creditors of the trade, he says, "If I am not bound by decision, the convenience of mankind requires me to hold that the creditors of the trade, as such, have not a claim against the distributed assets, in the hands of third persons under the direction of the same will, which has authorized the trade to be carried on for the benefit of other persons." That does not decide the point I have mentioned at all. All that it decides is that the claim of the creditors is limited to the assets devoted to trade. What their right against those assets is, Lord Eldon does not decide.

Then we have a case which I think comes nearest to the present case, *Ex parte* Edmonds.³ Lord Justice Turner says this:⁴ "The case of *Ex parte* Garland and the other cases referred to in the argument have not, in my opinion, any application to the present case. They proceed upon the principle that the executor or trustee directed to carry on the business having the right to resort for his indemnity to the assets directed to be employed in carrying it on, the creditors of the trade are entitled to the benefit of that right, and thus become creditors of the fund to which the executor or trustee has a right to resort."

Having read those two authorities, which, being the decisions of a Lord Chancellor and of the Court of Appeal in Chancery, would be binding on me, I need only say that I do not think the point arises in any of the subsequent cases, or was the subject of consideration in them. *Owen v. Delamere*,⁵ which contains a mere dictum of Vice-Chancellor Bacon, but still of course entitled to great respect if it did differ — which I do not think it does — from what Lord Justice Turner laid down in *Ex parte* Edmonds⁶ as the true principle, would not be binding upon me; but I do not think it is different, because Vice-Chan-

¹ 10 Ves. 121.² 10 Ves. 122.³ 4 D., F. & J. 488.⁴ 4 D. F. & J. 498.⁵ Law Rep. 15 Eq. 134.⁶ 4 D., F. & J. 488.

cellor Bacon is directing his attention to the point decided in *Ex parte Garland*, that is, that the creditors have no right to go beyond assets devoted to trade. The nature of the right as against those assets is not adverted to; that is plain; for after saying that *Ex parte Garland* “contains a clear, distinct, and luminous exposition of law on the subject,” — which it does upon the point that it is not the general estate of the testator which is liable, but only so much as he has authorized to be employed in the business, — the Vice-Chancellor says,¹ “The court will give effect to the trust which has been created by the testator, and will keep separate and applicable only to purposes of the trust that estate which the testator designated and directed to be employed for that purpose.” It is merely repeating *Ex parte Garland* without the slightest reference to the mode in which the claim is to be enforced.

The same may be said of the case of *Fairland v. Percy*.² I dispose of that by saying that Sir James Hannen goes no further, and that he does not consider the second point at all.

The question raised by the second point — that is, what is the right to resort — is not treated of, as far as I can see, in any reported decision except in the case of *Ex parte Edmonds*. I think it is inferentially referred to in Mr. Justice Lindley’s book, where I think he means to say the same that Lord Justice Turner said, although I must say, with great deference to Mr. Justice Lindley, it might have been more clearly put. Nothing can be clearer than the way in which Lord Justice Turner puts it; it is simply, as he says, the right to resort for indemnity to the assets actually directed to be employed; and the creditor is entitled to the benefit of that right.

What Mr. Justice Lindley says is this:³ [His Lordship then read the passage commencing, “If an executor of a deceased partner,” and ending, “lien on the assets of the deceased employed therein,” and continued:]

I am not sure that Mr. Justice Lindley had in view the remarks of Lord Justice Turner in *Ex parte Edmonds*,⁴ for he does not cite the case; but he may have arrived at the same conclusion independently.

The only other text-book that I have been looking at on this point is the last edition of Williams on Executors.⁵ After stating that a trade is not transmissible, but is put an end to by the death of the trader, it says: “Executors, therefore, have no authority in law to carry on the trade of their testator, and if they do so, unless under the protection of the Court of Chancery, they run great risk, even although the will contains a direction that they should continue the business of the deceased.” Then it says,⁶ “The testator may, by his will, qualify the

¹ Law Rep. 15 Eq. 139.

³ Lindley on Partnership (3d ed.), p. 1103.

⁵ 8th ed. p. 1798.

² Law Rep. 3 P. & M. 217.

⁴ 4 D., F. & J. 488.

⁶ Page 1800.

power of his executor to carry on trade, and limit it to a specific part of the assets, which he may sever from the general mass of his property for that purpose ; and then in the event of the bankruptcy of the executor, the rest of the assets will not be affected by the commission, although the whole of the executor's private property will be subject to its operation." Although the author cites *Ex parte* Garland, he does not appear to me to deal directly with the question I have to deal with, which is, What is the nature of the right of the creditors against the assets specifically appropriated by the testator for the purpose of carrying on the trade? I am therefore really thrown back on the authority of Lord Justice Turner. If the right of the creditors is, as is stated by Lord Justice Turner, the right to put themselves, so to speak, in the place of a trustee, who is entitled to an indemnity, of course, if the trustee is not entitled, except on terms to make good a loss to the trust estate, the creditors cannot have a better right. They do get some additional benefit so as to avoid a supposed injustice ; but the injustice to be avoided is the injustice of the *cestui que trust* walking off with the assets which have been earned by the use of the property of the creditor ; but where the *cestui que trust* does not get that benefit, there is no injustice as between him and the creditors, and there is no reason for the court interfering at the instance of the creditors to give them a larger right than that they bargained for, namely, their personal right against the trustee. It appears to me, therefore, that if the trustee has no such right in such a case, they have none here.

The particular case before me is peculiar. It appears by the evidence, and it is the fact, that the executor carried on the Cambridge business in his own name and not in the name of the infant, which was strictly in accordance with the terms of the will, for I do not suppose he could carry it on in any other way. By the will the testator allowed him to make use of one-eighth of the residue for the purpose of carrying on the business on behalf of the legatee, who was an infant of the name of Neill, during his minority ; then Neill, on his attaining twenty-one, was to be allowed to take the stock in trade, if he thought fit, not at its then value, but at its value at the testator's death, and all the rest fell into residue. But the executor and trustee did not follow the will, for, as I said before, he carried on business in his own name as executor, and used the assets then in the business. He did not do what the testator told him to do, namely, collect the book debts and throw them into general residue with the business, and then make use of one-eighth of the residue ; he kept no separate banking account so as to show the actual sums of money used in the business, but he carried on the business as it had been carried on before. Whether that makes any difference or not it is immaterial now to inquire, but that is what he actually did. He carried on the business, and in carrying it on he

received £764 16s. 1d. more profits than he has accounted for, and this amount he owes the estate. Besides that, he was carrying on the London business belonging to the estate. From that and other sources he has received £1,668 3s. 1d. more than he has accounted for; so that he is a very large defaulter. It is manifest that he could not take one penny out of this estate by way of indemnity until he made good his default.

Therefore, unless the creditors can be in a position to show — as to which there is no evidence before me — that there were profits from carrying on the business to an amount exceeding the deficit, so that something was gained by the use of these assets, it does not appear to me that they can be entitled to anything.

As the facts on this point do not appear, I will give the creditors liberty to present a petition within a limited time, if they think they can support it, and I will not allow the assets to be distributed until they have had time to present their petition. I do not think it is a case to make the creditors pay costs.

The summonses are, therefore, dismissed without costs.¹

¹ *Ex parte* Edmonds, 4 D., F. & J. 488, 498 (*semble*); *Re* Morgan, 18 Ch. D. 93, 99 (*semble*), *accord.* — ED.

WAKEFIELD v. MARTIN AND TRUSTEES.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, FEBRUARY TERM,
1799.

[*Reported in 3 Massachusetts Reports, 558.*]

WILLIAM C. MARTIN, being indebted to James Scott in the sum of \$5,000, and having shipped a parcel of goods on board the ship —, upon which he had effected a policy of insurance, in order to secure Scott, assigned the bills of lading and the policy to him by a blank indorsement. A total loss happened. The plaintiff, a creditor of Martin, summoned Welles, one of the underwriters, as trustee of Martin; Welles having no knowledge of the assignment to Scott.

The question was, whether this assignment to a creditor, without notice to the underwriters, was good so far as to vest a property in the assignee, and thus preclude an attachment.

Mr. Parsons, for Scott, contended that the assignment was good and perfect as between the assignor and assignee, and vested an equitable right in the latter; and although, if the underwriters had actually paid the loss to Martin without notice of the assignment, they would have been discharged, yet that an attaching creditor was in no better condition than the assignor himself.

Mr. Ames, for the plaintiff, contended that a policy of insurance was not assignable; that it was a mere chose in action, and by law no property vested in the assignee; that the assignor might revoke the authority, or might release and discharge the underwriters: that the attaching creditor stepped in with the authority of the law, and effected this revocation; and that a contrary doctrine would introduce great frauds.

THE COURT, after taking time, pronounced their opinion unanimously, that the assignment, though without the knowledge or assent of the underwriter, vested an equitable right in the assignee; and, therefore, they discharged the trustees.¹

¹ In England, and in most of the States of this country, a creditor can reach by legal process only the debtor's interest in a chose in action. Accordingly, if the debtor has previously assigned the chose in action, the creditor is bound by the assignment, even though the assignee has given no notice thereof to the obligor. *Lewis v. Wallis*, T. Jones, 222; *Westoby v. Day*, 2 E. & B. 605; *Pickering v. Ilfracombe R. R.*, L. R. 3 C. P. 235 (overruling *Watts v. Porter*, 3 E. & B. 743); *Crayton v. Clark*, 11 Ala. 787; *Walling v. Miller*, 15 Cal. 38; *Whitten v. Little*, Ga. Dec. (Pt. II.) 99; *Cairo Co. v. Killenberg*, 82 Ill. 295; *Walters v. Washington Co.*, 1 Iowa, 404; *Smith v. Clarke*, 9 Iowa, 241; *McGuire v. Pitts*, 42 Iowa, 535; *Stockton v. Hall*, Hardin, 160; *Littlefield v. Smith*, 17 Me. 327; *Milliken v. Loring*, 37 Me. 408; *Hardy v. Colby*, 42 Me. 381; *Brady v. State*, 26 Md. 290; *Dix v. Cobb*, 4 Mass. 508; *Providence*

Bank v. Benson, 24 Pick. 204; Martin v. Potter, 11 Gray, 37; Kingman v. Perkins, 105 Mass. 111; Norton v. Piscataqua Co., 111 Mass. 532; Thayer v. Daniels, 113 Mass. 129; Boston Music Association v. Cory, 129 Mass. 435; McDonald v. Kneeland, 5 Minn. 352; Williams v. Pomeroy, 27 Minn. 85; Smith v. Sterritt, 24 Mo. 260; Smith v. Longmire, 24 Hun, 257; Grosvenor v. Allen, 9 Paige, 74 (see also Van Buskirk v. Hartford Co., 14 Conn. 583); Haldeman v. Hillsborough Co., 2 Handy, 101; Copeland v. Manton, 22 Ohio St. 398; Stevens v. Stevens, 1 Ashm. 190; U. S. v. Vaughan, 3 Binn. 394; Pellman v. Hart, 1 Barr, 263; Noble v. Thompson Oil Co., 79 Pa. 354; Canal Co. v. Insurance Co., 2 Phila. 354; Noble v. Smith, 6 R. I. 446; Northam v. Cartwright, 10 R. I. 19; Tazewell v. Barrett, 4 Hen. & M. 259; Anderson v. De Soer, 6 Grat. 363; Bank of Valley v. Gettinger, 3 W. Va. 309.

But see *contra*, Woodbridge v. Perkins, 3 Day, 364; Judah v. Judd, 5 Day, 534; Bishop v. Holcomb, 10 Conn. 444 (*semble*); Van Buskirk v. Hartford Co., 14 Conn. 141; Clark v. Connecticut Co., 35 Conn. 303 (*semble*) (see also Warren v. Copelin, 4 Met. 594); Clodfelter v. Cox, 1 Sneed, 330; Mutual Co. v. Hamilton, 5 Sneed, 269 (*semble*); Dewes v. Olwill, 59 Tenn. 432; Flickey v. Loney, 4 Baxter, 169 (*semble*); Penniman v. Smith, 5 Lea, 130; Daniels v. Pratt, 6 Lea, 443 (*semble*); Dinsmore v. Boyd, 6 Lea, 689 (*semble*) (see, however, Sugg v. Powell, 1 Head, 221; Gayoso Inst. v. Fellows, 6 Cold. 471-472; Cornick v. Richards, 3 Lea, 1); Barney v. Douglas, 19 Vt. 98; Ward v. Morrison, 25 Vt. 593; Loomis v. Loomis, 26 Vt. 198, 203 (*semble*); Dale v. Kimpton, 46 Vt. 76. Conf. Conway v. Cutting, 51 N. H. 407.

In strict analogy with the principal case, one to whom certificates of stock have been transferred is protected against subsequent attaching creditors of the assignor, although no notice of the transfer has been given to the company. Robinson v. Nesbitt, L. R. 3 C. P. 264; Dunster v. Glengall, 3 Ir. Ch. 47; Continental Bank v. Eliot Bank, 7 Fed. Rep. 369; People v. Elmore, 35 Cal. 653; Smith v. Crescent Co., 30 La. Ann. 1378; Boston Music Association v. Cory, 129 Mass. 435 (but see Fisher v. Essex Bank, 5 Gray, 373; Boyd v. Rockport Mills, 7 Gray, 406; Blanchard v. Dedham Co., 12 Gray, 213; Rock v. Nichols, 3 All. 342, *contra*); Merchants' Bank v. Richards, 6 Mo. App. 454; Broadway Bank v. McElrath, 2 Beas. 24; Hunterdon Bank v. Nassau Bank, 17 N. J. Eq. 496; Comm. v. Watmough, 6 Whart. 117; Finney's Appeal, 59 Pa. 398; Frazer v. Charleston, 11 S. Ca. 486; Cornick v. Richards, 3 Lea, 1 (overruling in effect State Co. v. Sax, 2 Tenn. Ch. 507); Cherry v. Frost, 7 Lea, 1 (*semble*); Strange v. Houston Co., 53 Tex. 162 (*semble*), *accord*.

But see Weston v. Bear River Co., 5 Cal. 186; 6 Cal. 425; Naglee v. Pacific Co., 20 Cal. 529; Shipman v. Ætna Co., 29 Conn. 245; Colt v. Ives, 31 Conn. 25; People's Bank v. Gridley, 91 Ill. 457; Skowhegan Bank v. Cutler, 49 Me. 315; Pinkerton v. Manchester Co., 42 N. H. 424; Sabin v. Bank of Woodstock, 21 Vt. 353, *contra*. — ED.

SECTION VI.

How far Trust Property is affected by the Marriage of the Trustee.

NOEL v. JEVON.

IN CHANCERY, MICHAELMAS TERM, 1678.

[*Reported in Freeman's Chancery Cases*, 43.]

THE bill was to be relieved against the defendant's dower, her husband being only a trustee; and it appearing that the husband was but a trustee, the defendant was barred of her dower, contrary to the opinion of *Nash v. Preston*; ¹ and so it was said is the constant practice of the court now.²

¹ Cro. Car. 191.

² *Bevant v. Pope*, Freem. C. C. 71; *Hinton v. Hinton*, 2 Ves. 631; *Powell v. Monson*, 3 Mason, 347, 364; *Robison v. Codman*, 1 Sumn. 121, 129; *Bailey v. West*, 41 Ill. 290; *Langworthy v. Heeb*, 46 Iowa, 64; *Dean v. Mitchell*, 4 J. J. Marsh. 451; *Bartlett v. Gouge*, 5 B. Mon. 152; *Dimond v. Billingslea*, 2 Har. & G. 264; *Cowman v. Hall*, 3 Gill & J. 398; *White v. Drew*, 42 Mo. 561; *Prescott v. Walker*, 16 N. H. 340, 343 (*semble*); *Hopkinson v. Dumas*, 42 N. H. 296; *Germond v. Jones*, 2 Hill, 569, 573; *Cooper v. Whitney*, 3 Hill, 95; *Gomez v. Tradesmen's Bank*, 4 Sandf. 102; *Buffalo Co. v. Lampson*, 47 Barb. 533; *Terrett v. Crombie*, 6 Lans. 82; *Greene v. Greene*, 1 Ohio, 244, 249; *Derush v. Brown*, 8 Ohio, 412; *Firestone v. Firestone*, 2 Ohio St. 415; *Plantt v. Payne*, 2 Bail. 319; *Thompson v. Perry*, 2 Hill Ch. 204; *Gannaway v. Tarpley*, 1 Coldw. 572, *accord*.

Nash v. Preston, Cro. Car. 191 (overruled); *Holbrook v. Finney*, 4 Mass. 566 (*semble*), *contra*.

See also *Hiscock v. Jaycox*, 12 N. B. R. 507; *Bopp v. Fox*, 63 Ill. 540; *Simpson v. Leech*, 86 Ill. 286; *Dyer v. Clark*, 5 Met. 562; *Willet v. Brown*, 65 Mo. 138; *Coster v. Clark*, 3 Edw. 428; *Mowry v. Bradley*, 11 R. I. 370, in which cases it was decided that the widow of a partner was not entitled to dower in land held by husband as trustee for the partnership. The cases of *Markham v. Merrett*, 8 Miss. 437, and *Smith v. Jackson*, 2 Edw. 28, *contra*, cannot be sustained. — Ed.

CURTESY. — A husband is not entitled to curtesy in lands of which his wife is seised merely as trustee. *Bennet v. Davis*, 2 P. Wms. 318; *Chew v. Commissioners*, 5 Rawle, 160. See also *Welch v. Chandler*, 13 B. Mon. 420. — Ed.

USES. — The wife and husband of a feoffee to uses were entitled to dower and curtesy respectively. Y. B. 14 Hen. VIII. f. 4, pl. 5; *supra*, p. 530; Bro. Ab. Feff. al Uses, pl. 40; *Chuddleigh's Case*, 1 Rep. 122 a; *Lewin, Trusts*, Introd. 3. See also, *supra*, 479, n. 1, 481, n. 1.

SECTION VII.

How far Trust Property is affected by the Death of the Trustee who is a Tenant pur auter vie.

STEPHENS v. BAILY.

IN CHANCERY, BEFORE TYRRELL, J., 1665.

[*Reported in Nelson, 106.*]

LESSEE for another man's life contracts with the plaintiff for a sum of money to convey an estate to him, but dies before the conveyance was perfected.

The defendant, being the heir of the lessee *pur auter vie*, enters, and holds the land as special occupant; and a bill being brought against him to perfect the assurance, he demurred to it, and it was insisted for him that he was in possession as an occupant, and so was not privy to his father who made the contract.

Maynard, on the other side, argued, that an occupant is liable to an action of waste, and that was the Dean of Worcester's case; and that an occupant was bound by this agreement in equity: that the plaintiff, who was out of his money, ought to have relief: that where a man contracts for the purchase of lands, and dies before the assurance is executed, the heir of the vendor stands trusted for the purchaser, and is compellable in this court to execute the estate to him, and that trusts here are of another nature than uses are at common law: that a covenant doth not bind an occupant at law, because the estate which he possesseth by the occupancy is not assets in law; but here it is a trust: that if a copyholder takes money, and covenants to convey, his heir is not bound at law, yet this court will compel him.

So in this case, the lands are bound by the agreement in whose hands soever they fall.

Mr. Finch, for the defendant, insisted that this was not like the case of a copyholder; for the lord is bound to admit the heir, and then he is in by descent, and he may have an ejectment before admittance; 'tis more like the case of one seised in fee, who contracts to sell, and dies before any assurance, and without heir, so that his lands escheat to the lord: this court will not compel that lord to convey to the vendee. But *Maynard* said, the reason was, because by such conveyance the

lord would lose his ancient services which were due before the lands escheated.

To which it was replied, that this did not seem to be a tolerable reason, because the lord might make such a conveyance reserving the ancient services. But it being referred to Justice TYRRELL, he certified, that, having advised with the judges, he was of opinion that the defendant ought to answer; and so it was ordered.¹

¹ An occupant seems not to have been bound by a use. Bro. Abr. Feff. al Uses, fol. 338, pl. 10. — Ed.

SECTION VIII.

Forfeiture and Escheat of Trust Property by the Trustee's Crime, or Death without Heirs.

PIMBE'S CASE.

TRINITY TERM, 1585.

[*Reported in Moore, 196.*¹]

THROCKMORTON committed high treason, 18 Eliz., for which in 26 Eliz. he was attainted by trial. Between the treason and the attainder a fine was levied to him by Scudamore of certain lands to the use of Scudamore and his wife (who was sister to Throckmorton), and of the heirs of the said Scudamore. Afterwards Scudamore and his wife bargained and sold the lands to Pimbe for money. Upon discovery of the treason and the attainder of Throckmorton, the purchaser Pimbe was advised by *Plowden, Popham*, and many others, that the estate of the land was in the queen, because the queen is entitled to all the lands that traitors had at the time of the treason, or after. So the use which was declared to Scudamore and his wife upon the fine was void, by the relation of the right of the queen under the attainder, and the queen must hold the land, discharged of the use, because the crown cannot be seised to a use.

It is but justice to mention that, the case being represented to Queen Elizabeth, she, much to her honor, granted the land to the *cestui que use* by patent.²



PAWLETT v. THE ATTORNEY-GENERAL.

IN THE EXCHEQUER, TRINITY TERM, 1667.

[*Reported in Hardres, 465.*]

In a bill to redeem a mortgage, the case appeared to be thus: viz., the plaintiff had mortgaged lands in fee to one Ludlow for security of £3,000 with interest, and bound himself in a statute and recognizance

¹ The translation of the report is taken from Cruise, Uses, 47. — ED.

² "If one possessed of a term for years in trust for another be attainted of treason, whereby the interest of the term comes to the king by forfeiture, the king is not subject to this trust because he comes in in the post and cannot be seised to a use. P. 8 Jac. agreed." 2 Roll. Abr. 780 (C), pl. 1; Wike's Case, Lane, 54, s. c. — ED.

to perform the covenants of the mortgage, and to pay the money with interest at a certain day. The day past, the money unpaid. The mortgagee by his will devised all his goods, chattels, debts, and personal estate, his debts and legacies being paid, to his executor, and dies. Edmund Ludlow, son and heir of the mortgagee, is attainted of high treason by the new act of 12 Car. II. The king seizes; and the executor extends the plaintiff's lands upon the recognizance, who thereupon exhibits his bill against the king and the executor, and in it suggests that he could not pay the money at the day at the place appointed, viz. in the Strand in Middlesex, by reason of the plague; and that afterwards the mortgagee accepted the interest, and waived the forfeiture: and the question now upon a demurrer to the bill was, whether or no the plaintiff could have any remedy against the king, to have a redemption? And it was said for the king, that he could not; but that he must prefer his petition of grace and favor. For a mortgage is in the nature of a trust betwixt the mortgagor and mortgagee; and no more than the king can be seised to an use, or in trust for another, so as to have remedy against the king for it; Dyer 8, 7 Ed. IV. 27; no more is there any remedy against him to redeem a mortgaged estate. Also the king cannot be compelled to execute any conveyances; and although the ordinary process of the court may be stayed in case of a chattel, as when a trustee for years is outlawed, for the benefit of the *cestui que trust*, yet it is otherwise in case of a fee and freehold, as here. For though the *cestui que use* of a term for years may forfeit it for felony, yet a *cestui que trust* in fee cannot. And all the new acts of treason have especial provisos for this purpose, to be relieved against the king; which shows that they thought the parties not safe without them.

On the other side, it was said by those who were of counsel for the plaintiff and executor, that natural equity, such as in this case, was natural justice; and that an act of Parliament that should take it away would be void in itself, as is said in Doctor & Stud. And no more than the king can deny justice in his own case, no more can he deny common equity; and common equity is as due to the subject against the king as justice is. There is more than a trust in this case; the party here has an interest *sub modo*, viz. to have a redemption. Nor do the mortgaged lands here come to the crown *jure prærogativæ*, but by escheat, as he is lord paramount, and the lands held of him. And as well as a bill to redeem a mortgage lies against a lord by escheat, so well does it lie against the king. A lord that has land by escheat has it not merely in the *post*. And as a bill to redeem lies against the conisee of a statute, who extends for a debt due from the mortgagee, or against a tenant in dower; so does it lie against a lord by escheat, and by 3 Ed. III. If there be the king, lord, mesne and tenant, and the tenant be attainted of treason; although the mesnalty be extinct,

yet if there be a rent by surplusage, that remains, and shall be paid to the mesne, and he shall have remedy for it here by the course of the exchequer. And it would fall out to be very inconvenient, if it were otherwise; if the coming of lands into the king's hands should discharge the equity of redemption, where there is no wilful default in the party; but it is the act of God only, as in this case, and the cases of *cestui que trust* for years above cited.

HALE, Chief Baron. This is a case of great concern, and deserves great consideration. It was made a question in this present Parliament in the House of Lords, in the Earl of Cleveland's case; first, whether or no there be a right of redemption in this case against the king? And, secondly, if there be, what remedy must be taken? And I answered, as I take the law to be, that in natural justice redemption of a mortgage lies against the king. But to the other question I made no answer; because I took it to be a point of great importance. But I am of opinion, that the king cannot be compelled to recovery; but that an *amoveas manum* only lies in such case. And this is all that can be done, if a trustee forfeit the estate. And it is to be considered here, whether or no there be a right of redemption against the lord by escheat (for so the king is in here, and not by his prerogative) and how the course of chancery is in case of the redemption of mortgages, who shall redeem, and against whom. I agree the case of a statute merchant; for he comes in merely by the party, viz. by the act of the party, and the remedy that the law gives thereupon; and it is worth inquiring how the presidents are, where a trustee for years is outlawed, and the lands seized, what remedy the *cestui que trust* has there? But admitting that case, yet it may be otherwise in case of a fee-simple; as *cestui que trust* for years may forfeit his interest for felony; but *cestui que trust* in fee cannot; and I agree the case in 3 Ed. III. And I conceive that a mortgage is not merely a trust, but a title in equity. And the matter of redemption, it seems, is not the main business in the case; for Mr. Attorney-General offers to give way to a redemption, upon payment of the money: but the point is, who shall have the money, whether the executor and devisee, or the king? for both contend for it.

And the Chief Baron further said: If the condition of a mortgage be to re-enter upon payment of the money to the executors or administrators, there without doubt the heir should not have the money after forfeiture; because the mortgagee looked upon it only as a chattel; though if the word "heirs" were inserted into the condition, it would be more a question. But he said, he took the law to be the same in both cases. Yet he delivered no opinion in the principal case, but ordered a case to be made of it. And the cause was adjourned.

Afterwards in Hilary term, *in annis* 19 & 20 Car. II., it was argued again by counsel on both sides; and much to the same effect as before.

And the king's counsel insisted, that a mortgagor was not relievable against the king in equity :

First, because the king is not liable to a trust ; and a mortgage forfeited is of the same nature.

Secondly, because by the escheat the ancient right and tenure is destroyed, and the king is in *jure coronæ*.

Thirdly, estates in dower, frank-bank, tenancies by the courtesie, and of disseisors, are not liable to trusts, because they are in the *post* ; otherwise of occupancies.

Fourthly, the chancery has no jurisdiction over the king's conscience, but over the consciences of subjects only ; for that it is a power delegated by the king to the chancellor, to exercise the king's equitable authority betwixt subject and subject. Nor is it within the statute of 33 Hen. VIII. cap. 39, for equity against the king in the exchequer. And they cited Dyer, 8, 263 ; Lane's Rep. 54 ; Yelv. 115 ; Lane's Rep., Bowle's case.

But the plaintiff's counsel urged that relief lay :

First, although it did not lie, yet it is reasonable the Attorney-General should answer ; and the matter in law be respited till the hearing of the cause upon the proofs ; as is usually done in cases of demurrers, for difficulty of the matter.

Secondly, an equity of redemption is now of so great esteem in the law, that is assignable and deviseable ; and an occupant, a tenant in frank-bank, &c., as was held in Draper's case, shall be liable to it.

Thirdly, many persons are liable in equity notwithstanding the forfeitures of mortgages, who are not liable to trust : as when a corporation makes a lease, rendering rent, with a clause of re-entry ; and the lease comes to be forfeited through casualty or mischance, as in 39 Eliz., Throgmorton and Finche's case. Nor is the loss of the seignior any objection here : for as in case of a lord, mesne and tenant, if the seignior purchase the tenancy, the mesnalty is extinct, but the mesne shall have the rent by surplusage. So it is the king's case, 6 Rep., Sir John Molin's case. And the mesnalty shall be revived by the king's granting over ; and they cited the books of 8 Ed. III. 4, 5 ; 3 Ed. IV. 25 ; Litt. 339, 340 ; Dyer, 360.

HALE, Chief Baron. There is a diversity betwixt a trust and a power of redemption ; for a trust is created by the contract of the party, and he may direct it as he pleaseth ; and he may provide for the execution of it, and therefore one that comes in in the *post* shall not be liable to it without express mention made by the party ; and the rules for executing a trust have often varied, and therefore they only are bound by it, who come in in privity of estate. A tenant in dower is bound by it, because she is in in the *per*, but not a tenant by the courtesie, who is in the *post*. So all who come in in privity of estate, or with notice,

or without a consideration. But a power of redemption is an equitable right inherent in the land, and binds all persons in the *post*, or otherwise. Because it is an ancient right, which the party is entitled to in equity. And although by the escheat the tenure is extinguished, that will be nothing to the purpose, because the party may be recompensed for that by the court, by a decree for rent, or part of the land itself, or some other satisfaction. And it is of such consideration in the eye of the law, that the law takes notice of it, and makes it assignable and devisable.

But the most considerable things in the case are :

First, that the king is in actual possession, and cannot be removed in equity by an *amoveas manum*, as he may at law.

Secondly, whether there will not be a diversity betwixt the estate of a ward and an escheat : for in cases of wardships, the court of wards had jurisdiction by the 33d of Hen. VIII., but in this case here is an actual inheritance in the king.

Thirdly, the statute of 33 Hen. VIII. c. 39, is to be considered, which gives relief in equity against the king.¹ And I conceive clearly, that in this case the executor would be relieved against the heir for the money ; because in common estimation it is but a personal estate.

But Baron ATKINS was strongly of opinion that the party ought in this case to be relieved against the king, because the king is the fountain and head of justice and equity ; and it shall not be presumed that he will be defective in either. And it would derogate from the king's honor to imagine, that what is equity against a common person, should not be equity against him.²

¹ See *Hix v. Attorney-General*, Hard. 176, where the *cestui que trust* of an obligation the trustee of which was a *felo de se*, was relieved against the king. — ED.

² “*Pawlett v. Attorney-General*, Hard. 465, in which Lord Hale and Baron Atkins thought the king was bound by an equity of redemption, was not a case of *escheat*, as called by Lord Hale, but of forfeiture.” Lewin, *Trusts* (7th ed.), 227, n. (f). — ED.

THE KING v. DAME JANE ST. JOHN MILDMAV, LADY OF THE MANOR OF MARWELL, AND WILLIAM BRAY, ESQUIRE, HER STEWARD OF SAID MANOR.

IN THE KING'S BENCH, TRINITY TERM, 1833.

[Reported in 5 Barnewall & Adolphus, 254.]

LITLEDALÉ, J., in the course of this term, delivered the judgment of the court.¹ After stating the *mandamus* and return,² his Lordship proceeded as follows:—

The question is, whether if a copyhold tenant surrender his estate to the use of another, and afterwards commits and is convicted of felony before admittance of the surrenderee, the estate is by the custom forfeited to the lord?

The case was argued before us very elaborately, and all the authorities were fully entered into. The court did not at the time feel greatly pressed by the weight of those authorities; but, as they were numerous, and the argument was chiefly from analogy, we wished to look into them. After a careful examination of them, we are of opinion that the estate is by the custom forfeited to the lord, and that a peremptory *mandamus* ought not to issue. It is conceded that, as between the surrenderor and the surrenderee, the latter cannot be prejudiced by any act done by the former subsequent to the surrender, but is entitled to be admitted to the estate free from all mesne incumbrances. It is conceded also that the surrenderor, until the admittance of the surrenderee, continues tenant to the lord for all purposes of service. The estate, therefore, does not by the surrender vest in the lord. It is conceded also that the surrenderee before admittance takes nothing, but that on admittance he is in by relation from the time of the surrender, as between him and the surrenderor, yet he has not been tenant in the mean time; for it is distinctly held, in *Doe dem. Jeffries v. Hicks*,³ that if he be attainted in the mean time, the lord will not take by forfeiture.

If, then, no act of the surrenderee before admittance will work a for-

¹ See *supra*, 79, n. 1. — ED.

² The *mandamus*, after reciting the custom of the manor in regard to surrenders, stated that John Boyes, a tenant of the manor, surrendered his tenement August 4, 1830, to H. Southwell; that Southwell demanded admittance, but that the defendants refused. The return stated that Boyes, after the surrender, was convicted of felony, and that by the custom of the manor the tenement of a tenant convicted of felony escheated to the lord of the manor. A rule *nisi* was obtained for quashing this return as insufficient. — ED.

³ 2 Wils. 13.

feiture, and if it were held that the surrenderor after surrender, although he be tenant, cannot by any act of his work a forfeiture, it would follow that a considerable time might elapse, during which the lord's right of escheat is suspended, and that not by any act of his own, but by the acts of others, which he cannot prevent; for he can neither refuse to accept a surrender, nor compel a surrenderee to come in and be admitted. We do not find any authority for such a proposition. On the contrary, it is laid down by Lord Chancellor Macclesfield, in *Peachey v. Duke of Somerset*,¹ that the lord must always have such a tenant upon his lands as may be sufficient to answer all demands, and capable of committing forfeitures.

There are many authorities relating to freehold estates, and some relating to copyholds, which show that the tenant shall forfeit only that which he has; and therefore in *Pawlett v. The Attorney-General* (which was a case of freehold), it was held that a mortgagor had a right to redeem against the crown, where the mortgagee in possession had been attainted; but it is plain that in that case Lord C. B. Hale, sitting in equity, treated the mortgagee's interest in the land as a mere pledge and security for money. It is no authority whatever for saying that the estate was not forfeited to the lord at law.

It was argued that the court, in cases of *mandamus* to admit to copyhold estates, frequently looks to equitable interests; but, without at all denying that this may be so in some instances, it seems clear that this court cannot, in such a case as the present, enter into a question of trust or adjust the equitable rights of the parties.

Upon the whole, without minutely examining all the cases cited by the learned counsel for the surrenderee, we are of opinion, that as the surrenderor is conceded to be tenant for all purposes of service until the admittance of the surrenderee, so he is also tenant for the purpose of forfeiting.

*Rule discharged.*²

¹ 1 Stra. 454.

² Ellesmere, Office of Chancellor, f. 93, pl. 48; Jenk. 6 Cent. pl. 30; *Peachey v. Somerset*, 1 Stra. 447, 454; *Burgess v. Wheate*, 1 Ed. 177, 201, 246 (*semble*); *Atty.-Gen. v. Leeds*, 2 M. & K. 343; *Benzein v. Lenoir*, 1 Dev. Eq. 225, *accord*.

In *Jenkins*, 6 Cent. pl. 30: "At this day, where the tenant of the land is attainted of felony or treason, the use and trust for this land are extinguished; for the king, or the lord to whom the escheat belongs, comes in in the *post*, and paramount the trust; and upon a title elder than the use or trust, viz. the right of his lordship by escheat for want of a tenant."

In *Atty.-Gen. v. Leeds*, *supra*, Sir John Leach, M. R., said, p. 347: "It was settled by the case of *Burgess v. Wheate* that a *cestui que trust* has no title as against the lord who claims by escheat upon the death of the trustee without heirs."

In *Burgess v. Wheate*, 1 Ed. 177, Sir T. Clark, M. R., said, p. 201: "Another objection is, that Hale supposes the land will, on the trustee's attainder, or death *sans* heir, escheat to the crown, discharged of the trust; whereas in equity it will be liable to the trust. And then it is said, if the lord takes the estate subject to the trust, he

ought to have in return a reciprocal benefit on the death of *cestui que trust* without heir. I think this position and inference not warranted by any judicial determination. *Pawlett v. Attorney-General*, Hard. 465, *Geary v. Bearcroft*, Cart. 67, and *Eales v. England*, Prec. Chan. 200, are cited to support it.

"The first I shall consider by and by ; the others are mere dicta of judges, collateral and foreign to the matter in question. In *Carter*, 67, the question was, who should be considered as occupants. As to what *Bridgman* says in *Geary v. Bearcroft*, the whole must be taken together. The other three judges had urged the argument *ab inconvenienti*, and *Bridgman* answers them. They said, a man conveys lands to trustees, and they commit felony ; his lands shall be forfeited, though he may have relief in equity. *Bridgman* says, though equity may relieve, yet we must not take prejudice from equity against arguments at law. The equitable point is not the opinion of Lord *Bridgman*, it is only anticipating an equitable objection that might be made against it. Whoever looks into *Geary v. Bearcroft* will, nine out of ten, be of opinion with the three judges against *Bridgman*. Now, if he was mistaken in his legal point, it is more likely that he should in equity, being recently brought into that court from being a chamber conveyancer ; and on a writ of error in *B. R.* brought on *Bridgman's* opinion, the court affirmed the judgment of the three.

"As to *Pr. Chan. 200*, *Eales v. England*, the same expression is not in *Vernon*, and this was a very extraordinary medium of proof, of which no precedent had ever been before him ; it is proving *incertum per æque incertum*, if not *multo incertius*. Both the sayings of *Bridgman* aforesaid, and of *Trevor* here, have not the least relation to the matter in question. In this last case the question arose upon the death of a trustee for £300, in the life of the testator, whether the £300 legacy was lapsed. Lord *Trevor* might have used many more similar and certain instances. *Pitt v. Pelham*, 1 Ch. Ca. 177 ; 1 Ch. Rep. 283, must have occurred to him, where it was held that the death of trustee could make no alteration in respect of the beneficial interest : instances where trustees for payment of legacies have died in the testator's life, the estate has descended to their heirs, and been considered as a trust ; and many much more similar ; none more difficult to prove ; and had he been called upon to prove his medium, I believe he could not have done it. On the contrary, I believe, on the death of feoffee to uses, *sans* heir, the books say the lord shall take the fruits.

"This accidental acquirer of a benefit comes in lieu of another benefit, and *cestui que trust* seems no more relievable in this case than on a sale without notice by the trustee. I think the contrary notion has been introduced, by considering an escheat on the foot of a forfeiture. But they differ materially, not only in the manner of the crown's taking, but in respect of the consequences. The crown takes an estate by forfeiture, subject to the engagements and incumbrances of the person forfeiting. The crown holds in this case as a royal trustee (for a forfeiture itself is sometimes called a royal escheat) ; but, in general, I apprehend an escheat is taken free from any equitable claim. If a forfeiture is re-granted by the king, the grantee is a tenant *in capite*, and all mesne tenure is extinct. If land escheated be re-granted, he shall hold in honor. Therefore the position, that the lord takes the escheat subject to the trust, seems not warranted ; though it is not necessary, I think, to give an opinion upon it."

In *Benzein v. Lenoir*, *supra*, *Henderson, J.*, said, p. 257 : "If *Cossart* [the trustee] has lost his estate, the *cestui que trusts* have lost theirs also ; their interest being a mere shadow of the legal estate, vanishes when that ceases to exist, that is, when a different one arises, or, in the language of the law, where another comes in the *post* to an estate in the lands. I do not mean where the estate, to which the trusts were annexed, falls into other hands than those appointed by the creator of the trust to take it ; as where the devisee in trust dies before the deviser, there the heir takes the estate subject to the trust. The law is the same as to tenants by the curtesy, tenant in

dower, and the bargainee under a bargain and sale, who are said not to come in by the trustee, but by the law, their estates being the same with that of the trustee, and cast upon them by law, although not created by the act of the party. Nothing but the technical expressions, the *per* and the *post*, and not going beyond the letter of the maxim into the principle upon which it is founded, can for a moment sustain the idea that those estates were detached from the trusts. But the lord who comes in by escheat above his tenant's estate, the abator, the intruder, the disseisor, who thereby acquire a new estate, are not affected by the trust; and if as against them the trustee loses the legal estate, the trusts immediately vanish, as the shadow disappears when the substance is gone."

The notion that the lord taking by escheat is bound by a trust is countenanced only by the dissenting opinion of Lord Mansfield in *Burgess v. Wheate*, 1 Ed. 177, 229, the reasoning in which is fully answered in *Lewin, Trusts* (3d ed.), 281, by an alleged but improbable dictum of Lord Bridgman in *Geary v. Bearcroft*, Cart. 67 (see 1 *Hargrave's Juris. Exer.* 383, 391), and by loose dicta in *Eales v. England*, Prec. Ch. 200, and *White v. Baylor*, 10 Ir. Eq. R. 43, 54.

By St. 13 & 14 Vict. c. 60, § 15, trust property is not to escheat or be forfeited by reason of the attainder or conviction for any offence of the trustee. See *Re Martinez's Trusts*, W. N. (1870), 70. — ED.

USES. — The lord taking by escheat on the death of a feoffee without heirs was not bound by the use. Y. B. 14 Hen. VIII. f. 4, pl. 5; *supra*, p. 530; Bro. Ab. Feff. al Uses, pl. 40; *Chuddleigh's Case*, 1 Rep. 122 *a*, 139 *b*.

In *Chuddleigh's Case*, *supra*, Lord Coke said: "Without question a feoffee upon good consideration without notice, disseisor, or lord by escheat, lord of a villain, corporation, (*a*) an alien born, a person attainted shall not stand seised to a contingent use, no more than to a use *in esse* before the statute of Hen. VIII.;" and Popham, C. J., said, in the same case, 139 *b*: "The reason why the lord by escheat, or the lord of a villain, should not stand seised to an use, is, because the title of the lord is by reason of his elder title, and that grows, either by reason of the seigniority of the land, or of the villain, which title is higher and elder than the use or confidence is; and therefore should not be subject to it." See also *supra*, p. 497, n. 1. — ED.

(*a*) Bro. Ab. Feff. al Uses, pl. 40, *accord*. But a corporation may at the present day be a trustee. *Mayor v. Atty.-Gen.*, 2 Bro. P. C. 236; *Atty.-Gen. v. Foundling Hospital*, 2 Ves. Jr. 46. — ED.

SECTION IX.

A Disseisor of a Trustee is not chargeable with the Trust.

THE EARL OF WORCESTER AND OTHERS *v.* SIR MOYLE
FINCH AND ELIZABETH HIS WIFE.

IN CHANCERY, MICHAELMAS TERM, 1600.

[*Reported in Fourth Institute, 85.*]

THE queen being seised of the manor of Raveston and of certain lands in Stokegoldington (which the plaintiff pretended to be a manor either in right or reputation), granted by her letters-patent the manors of Raveston and Stokegoldington to the said Sir Moyle, and John Awdelye, and their heirs; but this was upon confidence, that they should grant the manor of Raveston to Sir Thomas Heneage and Anne his wife, and to the heirs of Anne; and the manor of Stokegoldington to Sir Thomas and Anne, and the heirs of Sir Thomas. Sir Moyle and Awdelye, by deed indented and inrolled *termino Trin.* 1588, 30 Eliz. in this court, for £1,000 bargained and sold to Sir Thomas Heneage and his wife the manors of Raveston and Stokegoldington, and the site of the priory of Raveston in the county of Buck., and all other their lands, tenements, and hereditaments in Raveston, Weston, Pidington, and Stokegoldington, in the county of Buck. To have and to hold the manor of Raveston and the site of the said priory, and all the premises in Raveston, Weston, Pidington, and Stokegoldington (other than the said manor of Stokegoldington), to the said Sir Thomas and dame Anne, and the heirs of the said dame Anne; and to have and to hold the said manor of Stockeg. to the said Sir Thomas and dame Anne, and to the heirs of Sir Thomas. Sir Thomas had issue by the said dame Anne the said Elizabeth, one of the defendants, his only child, and afterwards the said dame Anne died. The defendant alleged that Sir Thomas was disseised of Stokegoldington, and the plaintiff denied it. And after Sir Thomas, by deed indented and inrolled, bargained and sold the manor of Stokegoldington to the plaintiff for payment of his debts and died; and for payment of his debts they exhibited their bill against Sir Moyle, and the said Elizabeth his wife, for

the said manor of Stokegoldington, and the Lord Chancellor decreed it for the plaintiff. And upon a petition preferred by the defendants to Queen Elizabeth, she referred the consideration of the whole case to all the judges of England; and after hearing of the counsel of both parts on several days, and conference between themselves, these points for rules in equity were resolved: First, that if there were any disseisin that nothing passed to the plaintiff either in right or equity, for the disseisor was subject to no trust, nor any subpœna was maintainable against him, not only because he was in the *post*, but because the right of inheritance or freehold was determinable at the common law and not in the chancery, neither had *cestui que use* (while he had his being) any remedy in that case. Secondly, it was resolved by all the justices, that admitting that Sir Thomas Heneage had a trust, yet could not he assign the same over to the plaintiff, because it was a matter in privity between them, and was in nature of a chose in action, for he had no power of the land, but only to seek remedy by subpœna, and not like to *cestui que use*, for thereof there should be *possessio fratris*, and he should be sworn on juries in respect of the use, and he had power over the land by the statute of 1 R. III. cap. , and if a bare trust and confidence might be assigned over great inconvenience might thereof follow by granting of the same to great men, &c. Thirdly, when the land descended to Elizabeth, one of the defendants, as heir to her mother, and the trust descended to her from her father, the trust was drowned and extinguished. Fourthly, when any title of freehold or other matter determinable by the common law come incidently in question in this court, the same cannot be decided in chancery, but ought to be referred to the trial of the common law, where the party grieved may be relieved by error, attain, or by action of higher nature. And when the suit is for evidences, the certainty whereof the plaintiff surmiseth he knoweth not, and without them he supposeth that he cannot sue at the common law. It was resolved that if the defendant make no title to the land. then the court hath just jurisdiction to proceed for the evidence; but if he make title to the land by his answer, then the plaintiff ought not to proceed, for otherwise by such a surmise, inheritances, freeholds, and matters determinable by the common law shall be decided in chancery in this court of equity. And thus were these points resolved by Sir John Popham, Sir Edmond Anderson, Sir William Periam, and Walmeslye, Gawdye, Fenner, and Kingesmill, justices, and Clark and Savill, barons of the exchequer; and all this amongst other things they certified under their hands into the chancery, and thereupon the former decree was reversed. And in debating of this case it was resolved by the two chief justices, chief baron, and divers other justices, that if a man make a conveyance, and express an use, the party himself or his heirs shall not be received to aver a secret trust, other

than the express limitation of the use, unless such trust or confidence does appear in writing, or otherwise declared by some apparent matter. And Popham said, that covin, accident, and breach of confidence were within the proper jurisdiction of this court.¹

¹ See *Turner v. Buck*, 22 Vin. Ab. 21, pl. 5. — Ed.

USES. — In *Chuddleigh's Case*, 1 Rep. 120 *a*, Popham, C. J., said, 139 *b*: "The reason why a disseisor should not stand seised to an use was, because *cestui que use* had no remedy by the common law for any use, but his remedy was only in chancery; and because the right of a freehold or inheritance could not be determined in chancery, his title should not be drawn into examination there; and for this reason a disseisor shall not be compelled in the chancery to execute an estate to *cestui que use*, but *cestui que use* shall compel his feoffees in the Court of Chancery to enter upon the disseisor, or to recover the land against him at the common law: and then the chancery will compel the feoffees to execute the estate according to the use." — Ed.

